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## INTERPRETING THE SIXTEENTH AMENDMENT (BY WAY OF THE DIRECT- TAX CLAUSES)

*Erik M. Jensen\**

Readers of *Constitutional Commentary* may have missed the brouhahas, but Professor Calvin Johnson and I have been arguing for several years about the meaning of the Direct-Tax Clauses of the Constitution<sup>1</sup> and the Sixteenth Amendment to that Constitution.<sup>2</sup> I'm happy to say we disagree on almost everything, and less happy to note that neither constitutional lawyers nor tax lawyers seem to care very much about any of these issues.<sup>3</sup>

Our disagreements aren't only about academic trivia. For those who insist on practical consequences in legal arguments, there really may be something at stake here. The Direct-Tax Clauses, parts of the original Constitution, impose a cumbersome apportionment requirement on taxes that are "direct"—a rule tied to the apportionment rule for representation in the House of Representatives. In its original form, Article I, section 2 provided that

[r]epresentatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons,

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1. U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 9, cl. 4.

2. U.S. CONST. amend. XVI.

3. There are exceptions. For example, apparently worried that his wealth-tax proposals would be at risk if I were taken seriously, Professor Bruce Ackerman has trashed me at some length. See Bruce Ackerman, *Taxes and the Constitution*, 99 COLUM. L. REV. 1, 1-2, 30 n.112, 52-56 (1999). And the editors of the widely read journal *Tax Notes* have graciously printed just about everything Professor Johnson and I have wanted to say on the subject, most recently in Erik M. Jensen, *The Constitution Matters in Tax*, 100 TAX NOTES 821 (2003). See also Lawrence Zelenak, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833 (1999) (another tax professor encroaching on what would be constitutional lawyers' turf if con lawyers cared about this sort of thing).

including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

The special counting conventions for slaves and "Indians not taxed" disappeared long ago,<sup>4</sup> but the apportionment rule remains. And Article I, section 9, clause 4 similarly provides that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

Everyone agrees that apportionment makes direct taxes very difficult to implement. The Sixteenth Amendment, ratified in 1913, provided some relief, eliminating apportionment as a requirement for "taxes on incomes": "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." But the Amendment seemed to leave apportionment intact for other direct taxes, whatever they are. Avoiding apportionment thus requires that a levy be either indirect, in which case the Direct-Tax Clauses won't kick in at all (and the Sixteenth Amendment will be irrelevant), or a tax on incomes, which the Sixteenth Amendment immunizes.

A broad definition of "direct taxes" coupled with a narrow conception of "taxes on incomes" could leave the Direct-Tax Clauses with application broad enough to prevent significant change in the way the United States raises revenue. In the last decade, several new forms of national taxation have been proposed, including taxes on wealth<sup>5</sup> and various types of consumption taxes.<sup>6</sup> If these taxes would be direct but wouldn't be taxes

4. The Civil War Amendments took care of the rule for slaves, see U.S. CONST. amend. XIV, §§ 1-2; U.S. CONST. amend. XIII, and the category of "Indians not taxed" was effectively eliminated by statute. Indians "born within the territorial limits of the United States" are U.S. citizens as a result of the Act of June 2, 1924, ch. 233, (43 Stat. 253) 253 repealed by Act of June 27, 1952, ch. 1, § 301 (66 Stat.) 235 (current version at 8 U.S.C. § 1401(b)), and are thus generally subject to U.S. taxation.

5. See, e.g., BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999); Ackerman, *supra* note 3, at 56-58.

6. Proposed indirect-consumption taxes include a national sales tax or value-added tax. See Gilbert E. Metcalf, *The Role of a Value-Added Tax in Fundamental Tax Reform*, in *FRONTIERS OF TAX REFORM* 91 (Michael J. Boskin ed., 1996); Laurence J. Kotlikoff, *Saving and Consumption Taxation: The Federal Retail Sales Tax Example*, in *FRONTIERS OF TAX REFORM*, *supra*, at 160. The best-known proposed direct-consumption taxes are the so-called "flat tax," born in the academy but promoted by Steve Forbes and Dick Armey, see ROBERT E. HALL & ALVIN RABUSHKA, *THE FLAT TAX* (2d ed. 1995);, and the "USA Tax" (Unlimited Savings Allowance Tax), sponsored by Senators Nunn and Domenici, see S. 722, 104th Cong. (1995); see also Murray Weidenbaum, *The Nunn-Domenici USA Tax: Analysis and Comparisons*, in *FRONTIERS OF*

on incomes, they would have to be apportioned to be constitutionally valid. And if apportionment would be required for a proposed tax, the tax probably wouldn't be enacted: it's been 142 years since Congress went to the trouble of apportioning a tax.<sup>7</sup>

All of this is a long-winded way of explaining why I'm discussing the Direct-Tax Clauses in an exchange on interpreting the Sixteenth Amendment. The process of interpreting the Amendment is inevitably also the process of interpreting the Clauses. You can't hope to understand the Amendment without understanding what it was a reaction to.

The scope of the Amendment and the scope of the Clauses depend on the interpretation of two terms, "direct taxes" and "taxes on incomes." The Sixteenth Amendment doesn't matter, under any theory of interpretation, unless the Direct-Tax Clauses have some substance—unless, that is, the term "direct taxes" encompasses a significant body of levies.<sup>8</sup> And the Direct-Tax Clauses have no remaining substance today if every levy that might otherwise have been subject to the Clauses can be characterized as a "tax on incomes."

My conclusions about the proper way to interpret the Direct-Tax Clauses and the Sixteenth Amendment are simple: constitutional provisions ought to be taken seriously, and we ought to resist interpretive principles that would have the effect of gutting those provisions. Yes, the Direct-Tax Clauses took a peculiar form, but they were intended to be serious limitations on the national taxing power. And, although the Amendment was intended to cut back on the scope of the Clauses—to make an unapportioned income tax possible—it too should be interpreted in a way that takes the Clauses seriously. If, as I argue, the term "taxes on incomes" was intended to exempt only a particular (albeit important) category of taxes from apportionment, the apportionment rule has continuing effect for direct taxes that aren't taxes on incomes.

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TAX REFORM, *supra*, at 54. I'll not try to prove here that the flat tax and the USA tax would be consumption taxes (that is, they would be structured to exclude the savings component of income from the tax base, leaving only amounts spent on consumption). But no one seriously disagrees with that characterization; it was their universally understood character that made the proposals attractive to supporters and anathema to detractors.

7. The last apportioned direct tax was the Act of Aug. 5, 1861, ch. 45, (12 Stat.) 292.

8. The Amendment was historically important regardless of the meaning of the Direct-Tax Clauses. Whether the Amendment had any legal significance or not, it was probably politically necessary to get an income tax enacted.

Because issues of constitutionality often merge with issues of desirability, especially in popular discussions, it's worth making a couple of points to prevent misunderstanding of my arguments. First, when I defend the significance of the Direct-Tax Clauses, I don't mean to suggest that I would have drafted limitations on the taxing power in the way the founders did. My drafting preferences don't matter, nor do Professor Johnson's. Calvin Johnson and I are trying to understand the Constitution as it is, not as we wish it to be.

In addition, my exchange with Professor Johnson isn't about the most desirable forms of taxation. The universes of desirable taxes and constitutional taxes overlap, but they aren't necessarily identical. It may be that my understanding of the relevant constitutional provisions would prevent Congress from enacting forms of taxation that I would prefer, and it's certainly the case that the Constitution permits forms of taxation that Professor Johnson and I find odious. None of that is relevant to the present discussion.

To set the stage, in Part I, I outline the relevant constitutional structure. In Part II, I describe what I see as the fundamental differences (other than height and weight) between Professor Johnson and me. In Part III, I discuss the interpretive principles that ought to control in understanding the Direct-Tax Clauses. In Part IV I do the same for the Sixteenth Amendment.

## I. THE CONSTITUTIONAL STRUCTURE AFFECTING "DIRECT" TAXATION: THE BASICS

The Constitution's overall taxing power is broad: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises."<sup>9</sup> But two clauses in the Constitution limit congressional power to enact "direct taxes" by requiring that such taxes be apportioned among the states on the basis of population. That's a tough requirement to meet: if your state has one-tenth of the total population, it should bear one-tenth of the aggregate direct-tax liability, regardless of the state's proportion of the national tax base.<sup>10</sup>

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9. U.S. CONST. art. I, § 8, cl. 1.

10. I'm referring to "aggregate direct-tax liability" to mean the aggregate for any particular direct tax. If Congress were to enact more than one direct tax requiring apportionment, the apportionment would be done tax by tax, or so I assume. *See* U.S. CONST. art. I, § 9, cl. 4.

If your state also has one-tenth of the relevant national tax base, apportionment presents no particular problem: your one-tenth of the population will have to pay one-tenth of the total direct-tax liability. You might dislike the particular tax, and you might dislike the way the tax burden is distributed among your state's citizens and residents, but you shouldn't feel that your state is being gouged.

But suppose your state's share of the direct-tax base is only one-twentieth of the national total. Each taxed item in your state will be subject to tax at a rate *double* the otherwise applicable average, or Congress will have to come up with some other, equally klutzy mechanism to make the apportionment numbers come out right. Whatever the mechanism adopted, you and your fellow citizens of state *X* (particularly the citizens who might feel the pinch of a higher tax rate) are unlikely to see the tax as fair.<sup>11</sup>

Or if your state's share of the direct tax due is one-fifth of the national total? Each item will be subject to tax at a rate *one-half* the otherwise applicable average—good for your state, but bad for others. If Congress went ahead with direct taxation in those circumstances, when there's significant geographical variation, the statute would look very different from what we're used to.

This description is making apportionment sound more off-putting than it really is because not all levies are apportioned. The Constitution effectively divides the tax universe into direct taxes, which must be apportioned (unless exempted by the Sixteenth Amendment), and all other levies, which I'll call "indirect taxes." "Indirect taxes" isn't a constitutional term, but it's a shorthand way to refer to the "Duties, Imposts and Excises"—a subset of the "Taxes, Duties, Imposts and Excises" that Congress has the "Power To lay and collect"—that, under Article I, section 8, must "be uniform throughout the United States."<sup>12</sup> The uniformity rule has been interpreted to require only geographical uniformity for indirect taxes,<sup>13</sup> meaning that, "if a particular item is subject to tax, it must be taxed at the same rate

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11. For example, suppose we're talking about an income tax and suppose (unrealistically, given the Sixteenth Amendment) that an income tax must be apportioned. Your average state resident will have to pay as much in income tax as is paid by the average person nationally—probably meaning the tax rates applicable in your state will double the national average—even though your average resident has only one half of the national per capita income.

12. U.S. CONST. art. I, § 8, cl. 1.

13. See *Knowlton v. Moore*, 178 U.S. 41, 83-106 (1900).

throughout the United States, wherever it may be found.”<sup>14</sup> (For the moment, I’m ignoring another limitation on both direct and indirect taxes, the Export Clause’s prohibition against taxes or duties on “Articles exported.”)<sup>15</sup>

I’ve argued elsewhere that indirect taxes were generally understood to be those levies that are imposed on transfers of articles of consumption.<sup>16</sup> The founders assumed that the burden of such taxes was shifted to the ultimate consumer. As a result, there’s no incentive for the national government to raise an indirect tax rate too high because, if it does so, revenue will actually decrease: would-be purchasers will buy something else instead, or will take other actions to avoid or evade tax liability. With this understanding, the founders thought that no limitation other than the uniformity rule was necessary to constrain indirect taxation.

In contrast, direct taxes were understood not to be shiftable or avoidable—the burden was assumed to be borne by the party on whom the tax was imposed—and the potential for governmental abuse was therefore greater. At some level, any tax is avoidable, of course—including levies that almost everyone concedes to be direct. Suicide takes care of capitation tax obligations, and not buying real estate takes care of real-estate tax obligations. But the ease of avoidance is substantially greater when the choice is whether to buy a bushel of taxed wheat.

Under the constitutional scheme, any national levy is subject to either the apportionment rule or the uniformity rule—one or the other.<sup>17</sup> And the logic of the structure is that both rules can’t apply to the same levy. Geographically variable tax rates—which wouldn’t be permissible with a levy governed by the uniformity rule—are all but inevitable with an apportioned tax. (That’s why the uniformity rule, by its terms, doesn’t apply to “taxes.”) In the unlikely event that a direct-tax base is absolutely

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14. Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3, 10 (1987).

15. See U.S. CONST. art. I, § 9, cl. 5; Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1 (2003) [hereinafter Jensen, *Export Clause*].

16. See, e.g., Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2393-97 (1997) [hereinafter Jensen, *Apportionment*]; Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 ARIZ. ST. L.J. 1057, 1973-77 (2001) [hereinafter Jensen, *Taxing Power*].

17. There might be a residual category of levies subject to neither rule, but no one has figured out what such a levy would be. See Jensen, *Apportionment*, *supra* note 16, at 2341 and n.37.

uniform geographically (that is, the distribution of the tax base among the states correlates perfectly with population), the tax would seem to satisfy both the uniformity and apportionment rules. But only the apportionment rule would be technically applicable in that case.

For the first century of the nation's existence, the direct-tax apportionment rule played an important but limited role. Congress knew how to apportion a tax, and it explicitly did so with several real-estate taxes between 1798 and 1861.<sup>18</sup> Except for those direct taxes and a Civil War income tax, however, the national government generally relied for revenue on levies that were indirect, tariffs and excises. Furthermore, the understandings had developed, based on dicta in the 1796 decision in *Hylton v. United States*,<sup>19</sup> that apportionment is required only when it's easy to do (that is, when it imposes no substantial limitation on the taxing power) and that the only direct taxes for which apportionment is required are capitation taxes and taxes on real estate.<sup>20</sup> That didn't leave much of a role for apportionment.

The Direct-Tax Clauses contain no language that would support either of the *Hylton* dicta—indeed, it's counterintuitive to think that a limitation on the taxing power should apply only when it has no limiting effects—but in several nineteenth century cases, the *Hylton* dictum about capitation and real-estates taxes was restated as if it were scripture.<sup>21</sup> Until 1895, each unapportioned tax evaluated by the Supreme Court was characterized as a duty, impost, or excise—subject to the uniformity rule but not requiring apportionment. For example, in 1881, the Court upheld the validity of the Civil War income tax against the claim that it was a direct tax that hadn't been properly appor-

18. See Act of Aug. 5, 1861, ch. 45, (12 Stat.) 292; Act of Mar. 5, 1816, ch. 24, (3 Stat.) 255; Act of Feb. 27, 1815, ch. 60, (3 Stat.) 216; Act of Jan. 9, 1815, ch. 21, (3 Stat.) 164; Act of Aug. 2, 1813, ch. 37, (3 Stat.) 53; Act of July 14, 1798, ch. 75, (1 Stat.) 597.

19. 3 U.S. 171 (1796) (holding that a tax on carriages wasn't direct and therefore didn't have to be apportioned).

20. See *id.* at 174-75 (Chase, J.); *id.* at 177 (Paterson, J.); *id.* at 181, 183 (Iredell, J.); *infra* Part III.D.1.

21. See, e.g., *Springer v. United States*, 102 U.S. 586, 602 (1881) (“[D]irect taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate . . . .”); *Scholey v. Rew*, 90 U.S. 331, 348 (1875) (characterizing an estate tax on real estate as an excise on passage of value, rather than a direct tax on real-estate ownership); *Veazie Bank v. Fenno*, 75 U.S. 533, 543 (1869) (noting that direct taxes imposed to 1869 had been on real estate, and that “personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax”).



tioned. The income tax, said the Court, was "within the category of an excise or duty."<sup>22</sup>

Then came the Supreme Court's two 1895 decisions in *Pollock v. Farmers' Loan & Trust Co.*,<sup>23</sup> which struck down an 1894 income tax for violating the apportionment rule. (It took two decisions because the Court left so many open questions the first time.) On the controlling issues, the Court split 5-4, and given the post-*Hylton* case law, the result in *Pollock* was striking. To many, *Pollock* was a disastrous break with precedent—"the Dred Scott decision of government revenue," wrote Edwin Seligman.<sup>24</sup>

The Court actually made a noble effort to link its conclusion in *Pollock* to *Hylton*, concluding that there was no constitutional distinction between a tax on real estate and a tax on the income from real estate, but the tones of *Hylton* and *Pollock* were so different that the cases can be reconciled at only the most technical (and therefore misleading) level. In effect, by reconsidering the dictates of the Direct-Tax Clauses and by reconsidering the nature of an income tax, *Pollock* dramatically extended the universe of taxes potentially subject to apportionment.

After 1895 the Direct-Tax Clauses seemed important once again, but, despite *Pollock*, the idea of an income tax wasn't going to disappear. The income tax had become popular in Washington, and not only with Populist firebrands. Democrats and a few Republicans were critical of Congress's historical reliance on consumption taxes, generally excises and tariffs, to fund the government.<sup>25</sup> Consumption taxes didn't hit the rich nearly hard enough, and, in the late nineteenth century, there were some incredibly rich, and very visible, people. The push for an income tax was a push for fairness in the tax system—taxes should be based on ability to pay, it was argued—and the roadblock thrown by *Pollock* turned out to be temporary.<sup>26</sup>

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22. *Springer*, 102 U.S. at 602; see also *Scholey*, 90 U.S. at 347 ("it is expressly decided that the term ['direct taxes'] does not include the tax on income").

23. 157 U.S. 429 (1895) (determining that taxation of income from real estate is unconstitutional), *vacated by* 158 U.S. 601 (1895) (extending same principle to income from personal property and concluding that entire 1894 income-tax statute was unconstitutional).

24. Edwin R.A. Seligman, *THE INCOME TAX* 589 (1911). Professor Ackerman compares *Pollock* to *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Ackerman, *supra* note 3, at 5.

25. There had been an income tax during the Civil War, but it was temporary. It continued in effect until 1872. See Jensen, *Taxing Power*, *supra* note 16, at 1093-95.

26. See *id.* at 1093-1107.

The Sixteenth Amendment was the national response to *Pollock*. The Amendment, which worked its way through Congress in 1909 and was ratified in 1913, provides that "taxes on incomes, from whatever source derived," needn't be apportioned. The Amendment was necessary if only because it turned out to be politically impossible for Congress to attempt another income tax with *Pollock* still on the books: bucking a Supreme Court decision by enacting a new statute was more than many congressmen were willing to try, even if they thought *Pollock* horribly wrong. But with the Constitution amended, the Court's sensitivities were irrelevant. The Amendment made it possible for Congress to enact the modern *unapportioned* income tax, with geographically uniform rates.<sup>27</sup>

## II. THE COMBATANTS: JENSEN VERSUS JOHNSON

Some of my views about interpreting the Direct-Tax Clauses and the Sixteenth Amendment were obviously reflected in the way I described the basics in Part I above. I'll now make my positions on several areas of contention explicit and contrast them with what I understand to be Professor Johnson's views.

Here in essence is what I think. (1) By requiring direct taxes to be apportioned among the states on the basis of population, the founders intended the Direct-Tax Clauses to have real effect in limiting the national tax power. (2) The Supreme Court's early gutting of the Clauses in *Hylton*, with dicta limiting the category of "direct taxes" to easily apportionable taxes and, more specifically, to capitation and real-estate taxes, was wrong. (3) The Court did a much better job when it reinvigorated the Clauses a century later in *Pollock*.<sup>28</sup> (4) Because of the validity of the Court's result (if not all the reasoning) in *Pollock*, the Sixteenth Amendment was critical in making the modern income tax (but only the income tax) possible.<sup>29</sup> The bottom line: any tax

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27. See Jensen, *Taxing Power*, *supra* note 16, at 1107-28. This isn't to say the effects are the same throughout the country. States with higher per capita incomes will pay a disproportionately large per capita amount in income taxes. Indeed, one of the constitutional challenges to the 1894 income tax, which applied only to incomes above \$4,000, was that it was sectional in its effects. The burden was to be overwhelmingly borne by residents of a few northeastern, industrialized states. See Jensen, *Apportionment*, *supra* note 16, at 2367 n.173.

28. 157 U.S. 429 (1895), *vacated by* 158 U.S. 601 (1895).

29. See Erik M. Jensen, *The Constitution Matters in Taxation*, 100 TAX NOTES 821, 827-29 (2003) [hereinafter Jensen, *Constitution Matters*]; Jensen, *Taxing Power*, *supra* note 16, at 1107-28; Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct-Tax Clauses*, 15 J.L. & POL. 689, 707-08 (1999); Jensen, *Apportionment*, *supra* note

that is a direct tax but not a “tax on incomes” must be apportioned to be valid, and the universe of taxes potentially subject to apportionment isn’t trivial. These taxes probably include, for example, a wealth tax and a direct-consumption tax.

Contrarian that he is, Professor Johnson disagrees at every step. As I understand it, this is what he thinks. (1) The Direct-Tax Clauses were nonsense-on-stilts from the beginning. (2) The Supreme Court properly gutted the Clauses in 1796, limiting their application to at most capitation and real-estate taxes. (3) The *Pollock* decisions were clearly wrong in 1895. (4) Because *Pollock* was wrong, the Sixteenth Amendment was substantively unnecessary. The real purpose of the Amendment was to make it politically possible to proceed with a new income-tax statute, not to create new constitutional law. The Amendment can be interpreted as if it had torn *Pollock* out of *U.S. Reports*: in Professor Johnson’s view, the effect was to return the tax world to the pre-1895 understanding of the Direct-Tax Clauses, with *Hylton* once again in full glory.

The direct-tax apportionment rule would get in Congress’s way if it were taken seriously, and Professor Johnson does his dogged best to make sure that doesn’t happen. If there might otherwise be doubt about the characterization of a proposed new tax, Johnson favors “manipulative expansion” of key constitutional terms to circumvent the apportionment rule.<sup>30</sup> “Given its rapid expansion, ‘excise’ should be understood as a malleable concept that a [c]ourt can use to avoid apportionment. . . . ‘[I]ncome,’ too, is a malleable concept that a court can use to avoid apportionment.”<sup>31</sup> For Professor Johnson, almost every national levy is an “excise” (that is, an *indirect* tax), a “tax on incomes,” or maybe both—with no apportionment therefore required.

In the passages I’ve quoted, Professor Johnson refers to *courts* as avoiding apportionment. If he is right, though, what this really means is that *Congress* can avoid apportioning taxes and not have to worry about being second-guessed by the judiciary. If the constitutional terms that seem to limit the taxing power are “inherently malleable,”<sup>32</sup> they mean what Congress

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16, at 2375-77.

30. Calvin H. Johnson, *Purging Out Pollock: The Constitutionality of Federal Wealth or Sales Taxes*, 97 TAX NOTES 1723, 1734 (2002).

31. *Id.* at 1733.

32. See Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 101 (1990) (“[T]he common defense is an inherently malleable term the meaning of which must be

wants them to mean. If Congress says a levy is an "excise," *Voila!*, it's an excise. Or if Congress says a levy is part of a "tax on incomes," *Voila!*, it's a tax on incomes. The key phrases are effectively treated like "public use" and "general welfare"—terms that were once thought to have judicially enforceable content, but are now left to Congress to define.<sup>33</sup>

And Professor Johnson takes his arguments about the insignificance of the constitutional limitations on the taxing power farther than (almost) any other man has gone before.<sup>34</sup> Although the *Hylton* Justices understood the term "direct taxes" to include capitation and real-estate taxes, as did all other founders of whom I'm aware, Professor Johnson suggests that real-estate taxes (and, more broadly, wealth taxes<sup>35</sup>) should today be exempt from apportionment because of a "more general intent" evidenced at the founding.<sup>36</sup> Professor Johnson thinks that, in assuming a real-estate tax to be direct, the founders didn't understand the logic of what they were doing.

If the Direct-Tax Clauses don't apply to real estate, only capitation taxes remain subject to apportionment. And if by "capitation tax" we mean a lump-sum head tax, a capitation tax is automatically apportioned anyway (since the special counting rules for slaves and Indians not taxed are no longer relevant).<sup>37</sup> For Professor Johnson, the effect of the apportionment rule today is therefore zilch, and, with the Direct-Tax Clauses' having

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left to the judgment of Congress. The same should apply to the meaning of income in the sixteenth amendment.").

33. See *South Dakota v. Dole*, 483 U.S. 203, 208 fn.2 (1987) ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all") (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976)); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 239 (1984) ("[W]hen the legislature has spoken [in defining 'public use'], the public interest has been declared in terms well-nigh conclusive.") (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

34. One exception is Professor Ackerman, who also doesn't like having the Constitution interfere with his policy goals. See Ackerman, *supra* note 3, at 3 ("Under the constitutional regime inaugurated by the New Deal, there are no significant limits on the national government's taxing, spending, and regulatory powers where the economy is concerned—other than the requirement that government compensate owners if their property is taken for public purposes.").

35. In the agrarian society of the late eighteenth century, a real-estate tax was the quintessential wealth tax.

36. Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 70 (1998) ("Even considering land tax a 'direct tax' makes the apportionment requirement contrary to the more general intent.").

37. Even if a capitation tax could in theory be graduated, and Adam Smith made noises to that effect, the apportionment rule points toward a lump-sum head tax. See Jensen, *Apportionment*, *supra* note 16, at 2392-93.

no substantive effect, the Sixteenth Amendment is also irrelevant.

### III. INTERPRETING THE DIRECT-TAX CLAUSES

Surprisingly little of the disagreement between Professor Johnson and me has been about substantive tax principles. We might be able to fit accelerated depreciation into our constitutional discussions, but that's not going to happen here. Most of our discussion has involved the proper interpretation of the constitutional provisions.

I think the Direct-Tax Clauses were serious constitutional provisions from the beginning, and they should be taken seriously today. Professor Johnson doesn't. I think the Sixteenth Amendment should be understood as an important, but limited, carve-out from the Direct-Tax Clauses. Professor Johnson disagrees about that, too.

My starting proposition is that we should try to interpret any constitutional, statutory, or regulatory provision in its most robust form. At a minimum, that means resisting to the death the conclusion that a provision is meaningless and can therefore be ignored. If your method of interpretation leads you to conclude that a provision is nonsensical—and that's effectively how Professor Johnson characterizes the Direct-Tax Clauses: "a rule too silly to enforce"<sup>38</sup>—the appropriate response is to reconsider the method, not to accept the apparently nonsensical result.

And there are *two* Direct-Tax Clauses in the Constitution. Some have argued that the Clauses therefore have extra effect,<sup>39</sup> but we don't need to go that far. At a minimum, the second reference to apportionment makes it clear the rule wasn't an afterthought or an obvious mistake.<sup>40</sup>

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38. Johnson, *supra* note 30, at 1725.

39. See, e.g., Arthur C. Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 YALE L.J. 505, 515 (1910) ("The qualification of direct taxes is the only provision in the entire Constitution which appears twice in that instrument. This fact ought to teach us to hold it in still higher regard and to respect the more the earnestness and intent of the framers who placed it there.").

40. The Clause in what became Article I, section 2 of the Constitution, tying apportionment to both representation and direct taxation, was the subject of debate in July at the Convention. See Jensen, *Apportionment*, *supra* note 16, at 2386-89. But the second reference in section 9 seems to have been for purposes of completeness, to ensure that apportionment was in the list of limitations on congressional power. The language was added on the motion of George Read of Delaware near the end of the convention, on September 14, with no objection. Read was apparently concerned the government might use the direct-tax power to disproportionately impose levies on states that had been de-

Professor Johnson would nonetheless have us conclude that two clauses in the Constitution should be interpreted in a way that deprives them of any significant effect. I'll now consider, and reject, several of his justifications for interpreting the Direct-Tax Clauses so perversely: that the founders intended no significant limitations on the taxing power, that the Clauses are nonsensical in their operation, that the Clauses were inextricably linked to the odious system of slavery, and that we should defer to the founding-era Supreme Court's interpretation of the Clauses in *Hylton*. On the last point I consider at length whether founding-era governmental bodies were generally scrupulous enough in observing constitutional niceties to deserve uncritical reverence today. (The answer is "no.")

#### A. JOHNSON: "TAX WON"

Creating a workable national revenue system after the debacle of the Articles of Confederation was a critical reason for having a new constitution, and, at the Constitutional Convention, Professor Johnson says, "Tax won."<sup>41</sup> The Constitution was a "pro-tax" document,<sup>42</sup> and the founders therefore intended no significant limitations on the taxing power (other than the Uniformity and Export Clauses).

This is a point on which Professor Johnson and I don't engage because we see the world of 1787-1789 so differently. Professor Johnson apparently views the Constitution-writing process as binary: taxes either won or lost, direct taxes either won or lost, the Federalists either won or lost. The intellectual battles in Philadelphia were all-or-nothing, with the word "compromise" excised from delegates' vocabulary.

But nothing in the record justifies Professor Johnson's one-dimensional interpretation of history. Properly understanding the Constitution doesn't require that we choose between an unlimited (or nearly unlimited) taxing power and no taxing power at all. The Constitution was intended to strengthen the

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linquent under the requisitions system: "He was afraid that some liberty might otherwise be taken to saddle the States with a readjustment by this rule, of past Requisitions of Congress—and that his amendment by giving another cast to the meaning would take away the pretext." MADISON, SEPT. 14, 1787, IN CONVENTION (1787), reprinted in 2 FARRAND'S RECORDS: THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 618 (Max Farrand ed.) (1911).

41. Calvin H. Johnson, *Barbie Dolls in the Archeological Dig: Professor Johnson Responds*, 100 TAX NOTES 832, 840 (2003).

42. *Id.* at 838.

national taxing power, but let's put this in perspective. The "national" government had had *no* power to tax individuals under the Articles of Confederation; all it could do was requisition funds from the states. For tax to "win" in Philadelphia, it wasn't necessary to create an omnipotent taxing power. Tax "won" when the delegates agreed to something as simple as permitting the national government to levy duties on imports.

Professor Johnson expects us to believe that "[n]o proponent of this Constitution could have tolerated a hobble on federal revenue,"<sup>43</sup> but that's crazy. An awful lot of founders, including Federalists, insisted on restraints that Professor Johnson says were intolerable. His slogans don't even connect with the language of the Constitution, which includes the Uniformity Clause and the Export Clause as well as the two Direct-Tax Clauses—hobbles all. The constitutional context, Professor Owen Fiss has properly noted, was "defined by the desire to prevent abuses of the power of taxation,"<sup>44</sup> and, without constraints on the national taxing power, the Constitution wouldn't have been ratified.

Tax's victory wasn't total, and direct taxation's wasn't either. Professor Johnson quotes many founders on the importance of the national government's ability to impose direct taxes. For example, he notes that "Washington's stubborn refusal to allow anything that goes to the prevention of direct taxation represents the Founders' intent."<sup>45</sup> True enough; in that respect direct taxation "won." But the incontrovertible fact that the Federalists wanted the national government to have a direct-taxing power doesn't mean that direct taxes were subject to no limitations. To repeat the obvious: the Direct-Tax Clauses are in the Constitution, twice, and they can't be dispensed with just because they're inconvenient.

Finally, in tallying the results of the eighteenth-century tax wars, Johnson draws support for his expansive conception of the taxing power by noting that the Federalists generally "won" in Philadelphia and in the ratifying conventions and that the Anti-Federalists generally lost.<sup>46</sup> Of course the final document conformed more closely to the desires of constitutional supporters than to constitutional detractors. Who could disagree? But con-

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43. *Id.*

44. OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* 88-89 (1993).

45. Johnson, *supra* note 30, at 1728.

46. *See id.* at 1727.

stitution-writing isn't an either-or process, and the "winners" didn't get everything they wanted in undiluted form.

For example, the Federalists generally opposed the Export Clause, which prevents Congress from taxing "Articles exported."<sup>47</sup> Among the formidable opponents were Alexander Hamilton, James Madison, Gouverneur Morris, George Washington, and James Wilson, but the Clause survived.<sup>48</sup> And most Federalists didn't think the taxing power should be unlimited: Madison thought the direct-tax apportionment rule was "one of the safeguards of the Constitution."<sup>49</sup> Even the strongest proponents of a powerful national government didn't say in public that the government was to be unconstrained. Alexander Hamilton probably preferred an unlimited taxing power, and, in some passages in *The Federalist*, he suggested that only necessity, not constitutional language, should limit that power. But Hamilton was a realistic politician, who wanted the Constitution ratified, and he also stressed protections against abuse.<sup>50</sup> To say that the Federalists "won" isn't to say that the Direct-Tax Clauses can be ignored.

## B. BIZARRE RESULTS

Professor Johnson is convinced that the founders didn't understand what they were doing with the Direct-Tax Clauses. He argues that they really didn't want to limit the direct-taxing power at all, a proposition that is disproved by the very existence of the Clauses. But he has a more serious claim as well, that the founders unknowingly created a monster that, if given free rein, would devour Texas:<sup>51</sup> "Apportionment of direct tax turned out to be a rule too silly to enforce, in those cases in which the tax base is not equal per capita among the states."<sup>52</sup> Presented with two badly broken constitutional clauses that would inevitably

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47. See U.S. CONST. art. I, § 9, cl. 5.

48. See Jensen, *Export Clause*, *supra* note 15, at 6-15.

49. 4 ANNALS OF CONG. 730 (1794) (describing why he was voting against the unapportioned carriage tax later at issue in *Hylton*).

50. See, e.g., THE FEDERALIST NO. 36, at 172 (Alexander Hamilton) (Gary Willis ed., 1985) ("An actual census or enumeration of the people must furnish the rule; a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of [real-estate] taxation seems to have been provided against with guarded circumspection.").

51. Let's assume *arguendo* that that would be a bad thing.

52. Johnson, *supra* note 30, at 1725; see also *id.* at 1734 ("Apportionment is a silly and hobbling requirement, as the Founders recognized in *Hylton*, when the tax base is uneven.").



have produced bizarre results, he says, the *Hylton* Court acted in a statesmanlike way by slaying the monster. The Court did what it had to do.

If there were no way to make sense of the Direct-Tax Clauses, I might be sympathetic to Professor Johnson's demand that the Clauses be discarded. If a provision has no discernable reason for existence or if it just can't work to effectuate any legitimate purpose, then I suppose it has to go. But the founders weren't inept, the Clauses had their purposes, and the Clauses work in a defensible (albeit clunky) way.

Professor Johnson is correct, of course, that the founders didn't understand all of the consequences of the provisions they created. The founders thought in general that the direct-tax apportionment rule would prevent abuse—it would make direct taxes geographically “fair,” among other things—but they didn't prepare spreadsheets to study how the rule would work in a lot of hypothetical situations. Furthermore, there probably was no consensus (there certainly wasn't unanimity) about all of the taxes to which the Direct-Tax Clauses might apply.

But the appropriate response to criticisms of that sort is “So what?” Any good (or bad) lawyer can create uncertainty in the interpretation of any passage in any document. If unanimity were the criterion, no provision discussed in *Constitutional Commentary* would have any effect. We do the best we can.

The most often quoted passage from Madison's notes in support of the idea that the founders were clueless is Rufus King's unanswered question on August 20: “Mr King asked what was the precise meaning of *direct* taxation? No one answ[er]d.”<sup>53</sup> Although based on no evidence—who knows for sure why people *don't* speak?—the conventional wisdom is that, as Dwight Morrow explained in 1910, “Rufus King's question was not answered because no man in the Convention was able to answer it. He asked for a ‘precise’ definition of ‘direct taxation.’ As a matter of fact no man has yet satisfactorily answered that question.”<sup>54</sup>

Morrow was a smart man, but most of us stop hoping for absolute precision in the definition of legal terms after two

53. MADISON, AUG. 20, 1787, IN CONVENTION (1787), reprinted in 2 FARRAND'S RECORDS: THE RECORDS OF THE FEDERAL CONVENTION OF 1887, at 350 (Max Farrand ed.) (1911).

54. Dwight W. Morrow, *The Income Tax Amendment*, 10 COLUM. L. REV. 379, 398 (1910).

weeks of law school. We certainly don't discard terms just because our unrealistic hopes for precision are dashed. Besides, Morrow's interpretation isn't the only way to understand the silence that followed King's question. Keith Dougherty has supplied a more plausible explanation: "Lack of discussion reflected the virtual consensus on the issue and perhaps the limited thought put into the details."<sup>55</sup> Yes, the founders punted on the details—this was a *Constitution* they were writing—but they had a pretty good idea of what they wanted.

Or did they? Because the founders hadn't thought about the details, Professor Johnson says, they didn't understand the absurdity of the apportionment rule. As I've noted, one of Johnson's primary points is that "[a]pportionment of direct tax turned out to be a rule too silly to enforce, in those cases in which the tax base is not equal per capita among the states."<sup>56</sup> If the tax base isn't distributed equally, rates will probably have to differ among the states, and who could have intended that?<sup>57</sup> Just like the Justices in *Hylton*, Professor Johnson can conjure examples to make apportioned taxes look ridiculous,<sup>58</sup> preserving apportionment only when it is easy.

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55. KEITH L. DOUGHERTY, *COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION* 151 (2001). We do know that, in other contexts, King acted as if he understood the meaning of "direct taxes." For example, at the Massachusetts ratifying convention, he stated, "It is a principle of this Constitution, that representation and taxation should go hand in hand." RUFUS KING, *DEBATE IN THE MASSACHUSETTS RATIFICATION CONVENTION* (1788), reprinted in 2 ELLIOT'S *DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, at 36 (Jonathan Elliot ed.) (1836). When King later spoke out against requisitions, he again seemed to know what he was talking about:

The first revenue will be raised from the impost, to which there is no objection, the next from the excise; and if these are not sufficient, direct taxes must be laid. . . . [I]f we mean to support an efficient federal government, which, under the old Confederation, can never be the case, the pro posed [sic] Constitution is . . . the only one that can be substituted.

*Id.* at 57.

56. Johnson, *supra* note 30, at 1725.

57. In *Hylton*, Justice Chase had written that

[t]he Constitution evidently contemplated *no taxes as direct taxes*, but only *such as Congress could lay in proportion to the census*. The rule of *apportionment* is only to be adopted in such cases, where it can *reasonably* apply; and the *subject taxed*, must ever determine the application of the rule. *Hylton*, 3 U.S. at 174.

Justice Iredell agreed:

As all direct taxes must be *apportioned*, it is evident, that the Constitution contemplated none as direct, but *such as could be apportioned*. If this [carriage tax] cannot be *apportioned*, it is, therefore, not a *direct tax* in the sense of the Constitution.

*Id.* at 181.

58. In *Hylton*, Justice Chase wrote:

Suppose two States, equal in census, to pay 80,000 dollars each, by a tax *on carriages*, of 8 dollars on every carriage; and in one State there are 100 carriages

But if apportionment applies only where the tax base is “equal per capita among the states,” as Professor Johnson argues, apportionment applies only when it makes no difference. The rule is “enforced” when there’s nothing to enforce! Even with the Supreme Court’s blessing, that can’t be the right way to interpret a constitutional provision.<sup>59</sup>

The apportionment rule, while cumbersome, has a core of good (or at least defensible) sense, as a limitation on the congressional power to enact sectionally burdensome taxes.<sup>60</sup> For the founders, the possibility of taxes targeted at particular sections of the country wasn’t a trivial concern,<sup>61</sup> and, by itself, the uniformity rule does nothing to prevent a tax directed at geographically concentrated items.

Part—but only part—of the concern was slavery. The South was afraid that Congress might attack the peculiar institution by levying a tax on slaves, and the apportionment rule substantially lessened, if it didn’t eliminate, that possibility. Slaves were in fact taxed as part of several apportioned direct taxes on real estate,<sup>62</sup> on the understanding that slaves were inextricably linked to the associated land, but no direct tax was ever levied on slaves alone.

The rule nevertheless has application to *any* sectionally concentrated tax base, not just to slaves. Suppose a tax is imposed on the ownership of sleighs. Although rates may be the same throughout the country, so that the uniformity rule is satisfied, only the North will bear the burden of the tax—*unless* the tax is direct. If the tax is direct, however, the burden must also fall on states with a sleigh deficit—with the liability of any state de-

and in the other 1000. The owners of carriages in one State, would pay *ten times* the tax of owners in the other. A. in one state, would pay for his carriage 8 dollars, but B. in the other state, would pay for his carriage 80 dollars.

*Id.* at 174; see also *id.* at 181-82 (Iredell, J.); Johnson, *supra* note 30, at 1725 (arguing, for example, that, if apportionment were required with a carriage tax like that in *Hylton*, “the poor fool to drive the first carriage into Kentucky would have to bear Kentucky’s entire state quota”).

59. Professor Johnson approvingly quotes Alexander Hamilton’s argument in *Hylton*: “[N]o construction ought to prevail calculated to defeat the express and necessary authority of the government.” Johnson, *supra* note 30, at 1726. But you can’t tell what the founders thought the necessary authority of the government was without considering the express limitations built into the Constitution.

60. It has other purposes as well, including the general desire to constrain national power. I focus on the sectional taxation point because it makes the good sense of the rule apparent.

61. See, e.g., Jensen, *Export Clause*, *supra* note 15, at 6-15 (2003) (noting that the primary purpose of the Export Clause was to prevent sectionally-targeted taxes on exports).

62. See *supra* note 4.

pendent on its fraction of the national population, not the concentration of sleighs in that state.

Although Professor Johnson emphasizes that the apportionment rule, *if applied*, could lead to bizarrely different tax rates in different states,<sup>63</sup> his argument misses the point of the Direct-Tax Clauses. Professor Johnson correctly assumes that having different rates in different states will generally be seen as an absurdity, but it's *because* the rule might lead to facially suspect results that the rule has effect.

The Clauses should mean that, in ordinary circumstances, a direct tax aimed at a sectionally concentrated tax base (that is, a base that isn't at least approximately proportionate to population) won't be enacted. Who in Congress is going to vote for such a tax, except perhaps in an emergency like wartime, when revenue needs overwhelm other concerns?

While you as congressman might initially be inclined to support a tax that seems to hit other states—let's get those Montanans, heh, heh—it's not as though you're going to be able to do that secretly (and it's not as though the Montana congressmen and others similarly situated are going to vote for the tax). And, if the proposed tax is direct, it would wind up hitting your constituents as well: the apportionment rule ensures that regardless of the distribution of the tax base across the country (and even if you have few sleighs in your state), your constituents would have to pay their apportioned share of the total liability. How are you going to defend a vote for such a statute on the floor of Congress, or to your constituents back home, or to anyone else?

If Congress is inclined to use direct taxes at all (and even supporters of direct taxation thought the United States would rely on *indirect* taxation in the ordinary course of its business),<sup>64</sup> the apportionment rule pushes Congress in the direction of implementing only those direct taxes that have uniformly distributed bases—"equal per capita among the states," to use Professor Johnson's phrase. If the base of a proposed direct tax is "equal per capita among the states," the tax by definition will satisfy the apportionment rule, and it will be relatively easy to sell politically. For a sectionally concentrated tax base, however,

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63. Indeed, depending on how the taxed items are distributed, it could lead to bizarrely *higher* rates in poorer states. See Johnson, *supra* note 30, at 1725.

64. See Jensen, *Apportionment*, *supra* note 16, at 2382-83.

the apportionment rule should help prevent enactment of the tax.<sup>65</sup>

Professor Johnson would instead have the apportionment rule apply only if the tax base is uniformly distributed, when, by definition, there's no danger of sectional taxation. And the rule, he says, should have no application to cases in which nominally uniform taxes have sectionally disproportionate effects. That's backwards.

Nothing that I have said means that direct taxation is impossible. We shouldn't forget that Congress did in fact enact a number of apportioned direct taxes on real estate between 1798 and 1861.<sup>66</sup> Professor Johnson refers to the apportionment rule's operating as a "tax killer," to make direct taxation impossible,<sup>67</sup> but these statutes, which included complex mechanisms to ensure compliance with the apportionment rule, prove him wrong. The apportionment rule, taken seriously, makes direct taxation difficult, but not impossible.

Perhaps one can find a constitutional provision that is so nonsensical that it should be discarded for that reason, but the Direct-Tax Clauses don't approach that standard of absurdity. One might disagree with the goal of cabining congressional power, or be indifferent to the purported dangers of sectional taxation, or find fault with the way the apportionment rule implements its goals in a particular case. But by no standard is the rule "too silly to enforce."

### C. THE CONNECTION WITH SLAVERY

Professor Johnson, Professor Ackerman, and others have pointed to the Direct-Tax Clauses' unfortunate connection with slavery as a reason for jettisoning the Clauses. As Professor Ackerman puts it, "there is no longer a constitutional point in enforcing a lapsed bargain with the slave power."<sup>68</sup> This is obviously supposed to be a discussion-stopper: suggest that the Di-

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65. One hopes that such a tax wouldn't be enacted even without the apportionment rule, but the rule should clinch the case in the overwhelming majority of cases.

66. See *supra* note 18. You can tell from the dates (1798, 1813, 1815, 1816, and 1861) that these direct taxes were generally intended to raise revenue for war or the possibility of war.

67. Johnson, *supra* note 41, at 832.

68. Ackerman, *supra* note 3, at 58; see also *id.* at 31; Johnson, *supra* note 30, at 1724-25 & 1734.

rect-Tax Clauses should be taken seriously, and you might be accused of indifference to slavery and racism.<sup>69</sup>

Nonsense. I admit the obvious: the Clauses took the form they did, with the three-fifths counting rule for slaves, because of slavery. *But the apportionment rule, which applies to representation as well as direct taxation, wasn't pro-slavery.* Unfortunately it wasn't anti-slavery either, but it wasn't the unqualified evil that Professors Ackerman and Johnson think it was.

In his notes on the Constitutional Convention, James Madison described Gouverneur Morris's proposal of "proportioning direct taxation to representation," ultimately reflected in Article I, section 2, as having the "object [of] lessen[ing] the eagerness on one side, & the opposition on the other, to the share of Representation claimed by the S. <Sothern> [sic] States on account of the Negroes."<sup>70</sup> By tying apportionment to both representation and direct taxation, the rule had the effect of increasing the South's representation (by counting slaves as three-fifths of a person) but simultaneously increasing the South's share of any direct-tax liability (also by counting slaves as three-fifths of a person).<sup>71</sup> Any incentive the southern states might have had to overstate slave populations, so as to increase representation, would have come with a substantial cost: increased direct-tax liability. This was a compromise that worked because it fully satisfied neither side, and, viewed in its entirety, the compromise wasn't pro-slavery.

Madison discussed this point in *Federalist* 54. After noting that population would be used to govern both representation and direct taxation, he stressed that the rules are "by no means founded on the same principle."<sup>72</sup> The tension is a good thing:

As the accuracy of the census to be obtained by the Congress will necessarily depend . . . on the disposition, if not on the co-

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69. After my first article on this subject, Professor Ackerman accused me of defending the "legacy of racism." See Ackerman, *supra* note 3, at 30 n.112.

70. MADISON, JULY, 24, 1787, IN CONVENTION (1787), reprinted in 2 FARRAND'S RECORDS: THE RECORDS OF THE FEDERAL CONVENTION OF 1887, at 106 n.\* (Max Farrand ed.) (1911). As readers of *Constitutional Commentary* undoubtedly know, but the person on the street almost always gets wrong, it was the *slave* states that wanted slaves counted as full persons for purposes of representation.

71. Morris apparently didn't want the apportionment rule for direct taxation to survive; he "meant it as a bridge to assist over a certain gulph; having passed the gulph the bridge may be removed." MADISON, JULY, 24, 1787, IN CONVENTION (1787), reprinted in 2 FARRAND'S RECORDS: THE RECORDS OF THE FEDERAL CONVENTION OF 1887, at 106 (Max Farrand ed.) (1911) (footnote omitted). It survived nonetheless.

72. THE FEDERALIST NO. 54, at 275 (Alexander Hamilton) (Gary Willis ed., 1985).

operation of the States, it is of great importance that the States should feel as little bias as possible to swell or to reduce the amount of their numbers. . . . By extending the rule to both objects, the States will have opposite interests which will control and balance each other and produce the requisite impartiality.<sup>73</sup>

The compromise reflected in the Direct-Tax Clauses worked precisely because it was neither pro-slavery nor anti-slavery.

As a result of the Civil War Amendments, the Constitution was stripped of its most egregious connections with slavery, including the three-fifths rule. Discarding still other provisions because of a perceived slavery taint, as Professors Johnson and Ackerman want us to do, would expose the Constitution to a seemingly endless series of challenges. Where do we stop if we start unraveling the compromises that had some arguable connection with slavery? Was provision *A* too closely tied to tainted provision *B*? How do we tell? And what about *C*, which at one point was discussed in connection with *B*? If all constitutional provisions are up for grabs, one despairs of being able to invoke closure.<sup>74</sup>

With the apportionment rule, Professors Johnson and Ackerman might respond, we don't have any difficulty figuring out what the compromise was. It's right there in Article I, section 2, with the three-fifths rule used both for direct taxation and for representation. But that fact hardly strengthens their case. Why is it that Professors Johnson and Ackerman see the taint of slavery on only one side of the compromise (and, for that matter, only on the side that imposed a *cost* on slave states)? What principle would permit us to view the apportionment rule for direct taxation as irredeemably tainted, but not the apportionment rule for representation, *when the two rules are contained in precisely the same passage*?

I take it that Professors Johnson and Ackerman don't favor reconfiguring representation in the House of Representatives

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73. *Id.* at 279.

74. I don't mean to suggest that the Constitution was so tainted that the entire document was irredeemable. I reject Justice Thurgood Marshall's argument that Justice Taney's opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), accurately described the founders' moral and constitutional understanding of African-Americans. Compare Thurgood Marshall, *Reflections on the Bicentennial of the Constitution*, 101 HARV. L. REV. 1 (1987), with Erik M. Jensen, *Commentary: The Extraordinary Revival of Dred Scott*, 66 WASH. U. L.Q. 1 (1988). But in a document reflecting a multitude of compromises, it is often impossible to determine which provisions were tradeoffs for which.

because of the slavery taint, but why not? If we want to think in these terms—I'd prefer not to—the apportionment rule for representation was also part of a "lapsed bargain with the slave power."<sup>75</sup> The Johnson-Ackerman position seems to be result-oriented thinking at its worst: see a taint when you think it supports a result you want, and see no taint otherwise. That isn't a helpful canon of constitutional interpretation.

Despite its tangential connection with slavery, the direct-tax apportionment rule had independent reasons for existence, such as deterring sectionally directed taxation. Given the founders' fears of national taxing power, it's hard to imagine that the Constitution would have included no limitations on direct taxation even if slavery had not existed. The dangers of sectional taxation didn't begin with slavery and didn't disappear with the end of slavery. Yes, the limitation actually selected took a peculiar form, but that's not a reason for disregarding it.

#### D. DEFERENCE TO THE FOUNDING "GIANTS": THE UNDESERVED INFLUENCE OF *HYLTON*

Perhaps Professor Johnson's strongest argument for discounting the Direct-Tax Clauses is that the Supreme Court's 1796 decision in *Hylton v. United States*<sup>76</sup> demonstrates that, whatever language was used in the Constitution, the founders intended the Clauses to be toothless. In this part of the article, I'll question the supposition that what the Court did in 1796 or, more generally, what founders-in-power did defines the original understanding of the Constitution.

##### 1. *Hylton*

In *Hylton*, the Court upheld the constitutionality of an unapportioned carriage tax, enacted in 1794, against the challenge that the tax was direct.<sup>77</sup> By any standard, *Hylton* was a great case—extraordinary drama in oral argument, with former Treasury Secretary Alexander Hamilton representing the government, the taxing power of the new nation at issue, and the Supreme Court facing for the first time the question whether it could overturn a congressional enactment on constitutional grounds.<sup>78</sup>

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75. Ackerman, *supra* note 3, at 58.

76. 3 U.S. 171 (1796).

77. See Act of June 5, 1794, ch. 45, (1 Stat. 373) 373-75.

78. *Hylton* doesn't get the good press that *Marbury v. Madison* does because *Hylton* didn't strike down the carriage tax. For the posture of the case to have made any



The conclusion about the carriage tax was important at the time—the tax was a significant revenue-raiser—but it was the side dishes that made *Hylton* a sumptuous feast. In two sets of dicta, the *Hylton* Justices concluded that apportionment should apply only when it's easy to do (that is, when the tax base is uniformly distributed across the country),<sup>79</sup> and that only capitation taxes and taxes on real estate are direct. In Justice Chase's words, the direct taxes "contemplated by the Constitution, are only *two*, to wit, a *capitation*, or *poll tax*, *simply*, without regard to *property*, *profession*, or any *other circumstance*; and a tax on LAND."<sup>80</sup> Justice Iredell agreed: "In regard to other articles, there may possibly be considerable doubt."<sup>81</sup> While Justice Paterson was unwilling to concede that no other taxes could be direct, he too concluded that capitation and real-estate taxes were the "principal" examples.<sup>82</sup>

Professor Johnson is a fervent defender of *Hylton*'s dicta.<sup>83</sup> The Court in 1796 was made up of founders—"giants [who] walked upon the earth,"<sup>84</sup> in Johnson's phrase—and what they said in *Hylton* was unquestionably correct: those Justices "knew the Constitution far better than we do."<sup>85</sup> Marjorie Kornhauser has stated the *Hylton*-as-gospel argument in this more restrained way: "The gap in time between *Hylton* and the Constitution is small, the flaw in the Articles of Confederation well-known. Also persuasive is the fact that four of the justices in the *Hylton* case had been drafters or ratifiers of the Constitution."<sup>86</sup>

Of course we should care what the Supreme Court Justices wrote in their separate opinions in *Hylton*, and we should take those positions into account in trying to discern original under-

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sense, however, the Court must have concluded that it had the power to invalidate the tax.

79. See *supra* notes 20 and 58 and accompanying text. The assumption, without any data one way or the other, was that carriages *weren't* uniformly distributed.

80. *Hylton*, 3 U.S. at 175.

81. *Id.* at 183.

82. *Id.* at 177.

83. It's presumably only the dicta that matter to Professor Johnson. The Third Congress, also filled with giants, passed the carriage tax over complaints that it was direct. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 185-86 (1997). And George Washington signed the bill. Those who believe that whatever founders-in-power did was constitutional don't need the Supreme Court to conclude that the carriage tax was valid.

84. Johnson, *supra* note 30, at 1726.

85. *Id.*

86. Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 22 (1992) (footnote omitted).

standing. The *Hylton* opinions are relevant data. The case is nevertheless grossly overrated for many, many reasons.<sup>87</sup>

To begin with, I'm skeptical that the *Hylton* Justices knew the Constitution better than we do. They had firsthand knowledge of certain events, but they couldn't bounce around the country to attend multiple ratifying conventions, and they didn't have access to C-Span. We have available many primary sources that most members of the founding generation were unaware of.

And why would we think that the *Hylton* Justices knew the Constitution better than *other founders*? It's not as though there was unanimity in constitutional interpretation, even among those who supported the Constitution. Representative James Madison, for example, voted against the carriage tax at issue in *Hylton* because he thought it would "break down one of the safeguards of the Constitution."<sup>88</sup> The Justices got the final say on the carriage tax, and threw in the dicta as well, but that was by reason of their power, not by power of their reasoning.<sup>89</sup>

Most important, the *Hylton* Justices didn't tie their dicta to the critical primary source—the Constitution itself. It's more than a little peculiar to say we're deferring to the "founders" by adopting an interpretation that guts two constitutional provisions. If apportionment is to be applied only when it makes no difference, what's the point of the Direct-Tax Clauses? (The Clauses were designed to create incentives for Congress to impose only direct taxes with bases that are uniformly distributed, but that's different from saying the rule should be applied only in that situation.) And if only two categories of taxes were involved, why didn't the drafters just say that, rather than using the phrase "Capitation, or other direct, Tax" in Article I, section 9?

What's most bewildering about *Hylton* is that the dictum about capitation and real-estate taxes apparently leaves the Direct-Tax Clauses with no relevance to forms of taxation developed after 1787. Any unapportioned tax is constitutional just because the founders failed to mention it? That's an absurd way to interpret a constitutional limitation.<sup>90</sup>

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87. This is largely a discussion between proponents of an unlimited taxing power and those who see constraints on that power, but, amazingly, everyone apparently accepts the relevance of original understanding to the resolution of that issue.

88. 4 ANNALS OF CONG. 730 (1794).

89. Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

90. This is a classic example of why dicta shouldn't control in later cases: the Jus-

There was obviously a lot going on in 1796 other than close legal reasoning. The early Supreme Court was very different from the type of Court we take for granted today. Rather than seeing the Court as a check on the other branches, the *Hylton* Justices (Federalists all) viewed their function as supporting the Federalist government.<sup>91</sup> Indeed, *Hylton* was so clearly a phony dispute, with manufactured "facts," that it's hard to see why the Court decided this case except to make a statement about Federalist power.<sup>92</sup>

Whatever the *Hylton* Court said, we must test our interpretation of the Direct-Tax Clauses against the language and structure of the Constitution and against other founders' understanding of the same provisions. On those grounds, the *Hylton* Court was wanting. And, as I shall now argue, it wasn't just the Supreme Court in the early years of the Republic that played fast and loose with constitutional requirements. Whether it's the 1790s or the twenty-first century, it isn't a good idea to rely on those in power to define the limits of their power.<sup>93</sup>

## 2. Early Legislative Practice

Professor Johnson's "giants" weren't only on the Supreme Court in the 1790s; they were also in the executive branch and in Congress. We ought to be able to get an idea of the founders-in-power as interpreters of the Constitution by looking at legislation as well as adjudication. Everyone knows the insensitivities

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tices didn't consider the effect of their statements on future taxes because they didn't have to. But this example is even worse than usual because there was no one on the Court skeptical enough of congressional power to push the Justices to be more careful in their language. The practice of writing opinions *seriatim* also didn't advance the cause of linguistic precision.

91. See William R. Casto, *Oliver Ellsworth*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 292, 315 (Scott Douglas Gerber ed., 1998) (noting that "justices of the early Supreme Court simply did not view their positions the way modern justices do"); Jensen, *Taxing Power*, *supra* note 16, at 1079 n.115.

92. *Hylton* claimed to have 125 carriages for his own use (more "than then existed in Virginia." Edward B. Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 280, 283 n.1 (1907)), because the threshold amount required for Supreme Court review was \$2000 (125 carriages with tax and penalties of \$16 per carriage.) Even if believed, the phony claim shouldn't have worked: for jurisdictional purposes, the dollar amount at issue was supposed to *exceed* \$2000, see Judiciary Act of 1789, ch. 20, § 22, (1 Stat. 73) 84 and the parties had agreed that any liability of *Hylton's* could be discharged for sixteen dollars. See *Hylton*, 3 U.S. at 172.

93. Cf. *Lee v. Weisman*, 505 U.S. 577, 616 n.3 (1992) ("[P]ublic officials, no matter when they serve, can turn a blind eye to constitutional principle.") (Souter, J., concurring).

evidenced by the Alien and Sedition Acts,<sup>94</sup> but they're too easy. I'll examine an early tax statute, from the Fifth Congress in 1797, to demonstrate what we should have known anyway: even with taxation, giants can act in constitutionally suspect ways.<sup>95</sup>

First, some background: The Export Clause provides that "No Tax or Duty shall be laid on Articles exported from any State."<sup>96</sup> The Clause was an important part of the Constitution; without it, several southern states, worried that export levies might be targeted against the South, wouldn't have supported the Constitution.<sup>97</sup> And Chief Justice John Marshall in *Marbury v. Madison* used the Export Clause to defend the idea that "[i]n some cases . . . the constitution must be looked into by judges".<sup>98</sup>

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?<sup>99</sup>

Marshall wrote this in 1803, six years after the statute I'll examine, but that's beside my point. Marshall was stating the obvious: the Export Clause absolutely forbids certain forms of taxation.

Chief Justice Marshall used easy cases to make the case for judicial review, not to explicate the boundaries of the Export Clause. The doctrine of substance-over-form was known, at least at a rudimentary level, at the time of the founding; it's hard to imagine that the Clause was intended to prohibit only the most obvious of export levies. In a later case under the Import-Export Clause,<sup>100</sup> Marshall raised a hypothetical that he thought had a clear answer: If exports can't be taxed, could government instead tax exporters? "Would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that [an occupational tax] was a tax on the person, not on the article, and

94. See Act of July 6, 1798, ch. 66, (1 Stat.) 577; Act of July 14, 1798, ch. 74, (1 Stat.) 596.

95. The 1797 Act wasn't just a nuts-and-bolts statute, of course. The extent of the taxing power was a serious issue in the late eighteenth century, and the 1797 Act was a serious revenue-raiser at a time when war with France was possible.

96. U.S. CONST. art. I, § 9, cl. 5.

97. See Jensen, *Export Clause*, *supra* note 15, at 6-15.

98. 5 U.S. 137, 179 (1803).

99. *Id.*

100. U.S. CONST. art. I, § 10, cl. 2.

that the legislature had a right to tax occupations?"<sup>101</sup> Of course not.

Congress in 1797 nevertheless approved "An Act laying Duties on stamped Vellum, Parchment and Paper," titled to suggest that duties were being laid on documents, rather than associated goods.<sup>102</sup> At least three provisions in the Act were questionable when tested against the Export Clause's prohibition against taxes on "Articles exported," and one, dealing with taxes on bills of lading, was so clearly unconstitutional as to be laughable.

#### a. Taxes on Bills of Lading

Among other things, the 1797 Act imposed a tax of ten cents on "[a]ny note or bill of lading, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same State"; or, if the goods were "to be exported to any foreign port or place," the tax was twenty-five cents.<sup>103</sup> The Act thus taxed bills of lading for "goods to be exported to any foreign port or place" at a rate higher than that applicable to domestic bills.

Careful drafting by giants? First, note the apparent assumption, reflected in the statutory language, that goods moving from one state to another are being "exported." Many states maintained a sense of independence in the republic's early years, but the understanding that interstate commerce involved exportation was almost certainly wrong in 1797. In any event, it long ago disappeared as a possible interpretation of the Export Clause.<sup>104</sup>

More important, consider the merits of the tax. It was unquestioned that exported goods as such couldn't be taxed. The tax on bills of lading wasn't measured by the value or volume of exported goods, but that's irrelevant for Export Clause purposes. A tax of ten cents per shipment of exported cotton is as invalid under the Clause as a tax of one cent per pound or a tax of one cent per dollar of assessed value.<sup>105</sup>

Does a tax that clearly affects exportation become constitutionally acceptable if levied on *paperwork* associated with exported articles instead of on the articles themselves? To be sure,

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101. *Brown v. Maryland*, 25 U.S. 419, 445 (1827).

102. Act of July 6, 1797, ch. 11, § 1, (1 Stat.) 527.

103. *Id.* at 528.

104. It's now clear the reference is "only to exportation to foreign countries." *United States v. Hvoslef*, 237 U.S. 1, 13 (1915).

105. See Jensen, Export Clause, *supra* note 15, at 18-19.

the late eighteenth century was a more formalistic time than today. The tax wasn't challenged in court, and, when the 1797 Act was repealed after five years, it wasn't because of perceived constitutional problems.<sup>106</sup> In addition, as late as 1901, four Supreme Court Justices voted to uphold the constitutionality of such a tax.<sup>107</sup> So maybe a tax on bills of lading wasn't as blatant a violation of the Export Clause as a tax imposed directly on exported goods would have been.

Maybe. But the 1797 tax was the equivalent of taxing the air surrounding an exported article, and it doesn't take much sophistication to see that if such a tax isn't prohibited by the Export Clause, the Clause is a nullity. The Clause would prohibit only the most obvious sort of taxes, and thus give free rein to Congress to avoid its limitations. The Fifth Congress legislated with the Clause in mind—otherwise it simply would have taxed the goods—and it's hard to see this part of the 1797 Act as anything other than a transparent attempt to circumvent the Clause.

Indeed, that's the way the Supreme Court later characterized a similar tax enacted in 1898. In the 1901 case of *Fairbank v. United States*,<sup>108</sup> the Supreme Court considered a wartime stamp tax of ten cents on, among other things, "[b]ills of lading . . . for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place."<sup>109</sup>

Not surprisingly, the Court invalidated the 1898 tax in its application to exports. Defending the tax, the government had argued that the actions of the Fifth Congress confirmed the constitutionality of levies of this sort. The Court disagreed: "[W]hen the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged."<sup>110</sup> The substance of the tax was apparent: "a stamp duty on a bill of lading is in effect a duty on the article transported."<sup>111</sup> *Fairbank* echoed a

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106. See Henry Carter Adams, *Taxation in the United States 1789-1816*, in JOHN HOPKINS UNIVERSITY STUDIES IN HISTORY AND POLITICAL SCIENCE, SECOND SERIES V-VI 5, 57 (Herbert B. Adams ed., 1884) ("[U]pon the accession of Jefferson . . . , it was endeavored to change radically the financial policy of the United States. . . . [I]n 1802, all internal and direct taxes were abolished . . .").

107. See *infra* notes 108 and 110 and accompanying text.

108. 181 U.S. 283 (1901).

109. Act of June 13, 1898, ch. 448, (30 Stat. 448) 459 (Schedule A: Stamp Taxes). Bills of lading for domestic shipping were subject to only a one cent tax. *Id.* at 459.

110. *Fairbank*, 181 U.S. at 312.

111. *Id.* at 294.

similar point that Chief Justice Roger Taney had made in the 1860 case of *Almy v. California*.<sup>112</sup>

[A] tax or duty on a bill of lading, although differing in form from a duty on the article shipped is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another.<sup>113</sup>

Congress couldn't burden exports through a tax on exported articles, and that's exactly what it had done with the tax at issue in *Fairbank*, albeit surreptitiously.

I find it hard to believe, but the government did convince four Justices in *Fairbank* that the tax was valid. Adopting an incredibly formalistic position, Justice Harlan wrote that "stamp duties were imposed specifically for and in respect of the vellum, parchment or paper upon which was written or printed a bill of lading for goods or merchandise to be exported to foreign countries."<sup>114</sup> The dissenters cited the 1797 Act and a similar 1862 statute,<sup>115</sup> neither of which had been challenged judicially, to support the idea that such a tax was constitutional.<sup>116</sup> The dissenters had prior practice on their side, but common sense pointed in the other direction.

If the 1797 tax on bills of lading was as blatantly defective as I've suggested, why didn't someone challenge its constitutionality? The practice of running to the courthouse hadn't yet been perfected in the late eighteenth century, but even if it had been, such a challenge would have been pointless. The judiciary, including the Supreme Court, was hopelessly beholden to the rest of the Federalist government. Judicial silence on the constitutionality of all aspects of the 1797 Act reflected nothing more than the strength of the ties that had been exhibited the year before in *Hylton*.

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112. 65 U.S. 169 (1860) (interpreting the Import-Export Clause).

113. *Id.* at 174.

114. *Fairbank*, 181 U.S. at 315 (Harlan, J., dissenting).

115. Act of July 1, 1862, ch. 119, (12 Stat.) 432, *continued* by Act of June 30, 1864, (13 Stat. 223) 291, *repealed* by Act of June 6, 1872, ch. 315, (17 Stat. 230) 256.

116. *See Fairbank*, 181 U.S. at 306-12.

## b. Taxes on Export Insurance

It wasn't just the tax on bills of lading that marred the 1797 Act. The Act contained other suspect provisions as well, including a stamp duty on

any policy of insurance . . . , whereby any ships, vessels or goods going from one district to another in the United States, or from the United States to any foreign port or place, shall be insured, to wit, if going from one district to another in the United States, twenty-five cents; if going from the United States to any foreign port or place, when the sum for which insurance is made shall not exceed five hundred dollars, twenty-five cents; and when the sum insured shall exceed five hundred dollars, one dollar.<sup>117</sup>

The Fifth Congress knew the duty had export implications: if a ship carried exported articles, the insurance policy would relate, at least in part, to exported articles.

The 1797 Act was evaluated by no contemporaneous court. But in 1915 the Supreme Court rejected a similar tax, as applied to exports, in *Thames & Mersey Marine Insurance Co. v. United States*,<sup>118</sup> and the 1915 Court didn't seem to think the issues were difficult. Furthermore, in 1996, in *United States v. International Business Machines Corp.*,<sup>119</sup> yet another case involving a tax on export insurance, the Court backhandedly blessed *Thames & Mersey* by refusing to reconsider its earlier decision.<sup>120</sup>

As the Court said in 1915, and as Congress knew in 1797, exporting valuable goods without insurance is almost inconceivable. Insurance is "an integral part of the exportation."<sup>121</sup> *Thames & Mersey* concluded that the tax on insurance premiums was "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation."<sup>122</sup>

A tax on export insurance is a harder case under the Export Clause than a tax on bills of lading, but not by much.<sup>123</sup> Never-

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117. Act of July 6, 1797, ch. 11, § 1, (1 Stat. 527) 527.

118. 237 U.S. 19 (1915). The tax applied to insurance "upon property . . . whether against peril by sea or on inland waters," measured by the "amount of premium charged, one-half of one cent on each dollar or fractional part thereof." Act of June 13, 1898, ch. 448, (30 Stat. 448) 461.

119. 517 U.S. 843 (1996).

120. For a full treatment of the Court's bewildering treatment (really non-treatment) of important issues in *IBM*, see Jensen, *Export Clause*, *supra* note 15, at 17-35.

121. *Thames & Mersey*, 237 U.S. at 26.

122. *Id.* at 25.

123. Dissenting in *IBM*, Justices Kennedy and Ginsburg thought the two situations



theless, in *IBM*, dissenting Justices Kennedy and Ginsburg wrote that the 1797 Act should be given controlling weight in determining the original understanding of the Export Clause, and therefore in evaluating the constitutionality of a similar modern tax on insurance: "We have always been reluctant to say a statute of this early origin offends the Constitution, absent clear inconsistency."<sup>124</sup> Besides, the *IBM* dissenters noted, the *Thames & Mersey* Court was apparently unaware of the 1797 Act and therefore might have decided the case differently if it had known what the Fifth Congress had done.<sup>125</sup>

Justices Kennedy and Ginsburg were looking at early American history through rose-colored glasses. They rejected the idea that the Fifth Congress had been trying "to circumvent the Export Clause." In their view, "[t]he early Congresses were scrupulous . . . by making specific exemptions for exports in laws imposing general taxes on goods. Their refusal to grant exporters similar exemptions from insurance taxes indicates that those taxes were not viewed as equivalent to taxes on goods."<sup>126</sup> Yes, early Congresses were often scrupulous, but the Justices must not have studied the 1797 Act itself very carefully. Congress in 1797 tried to destroy the Export Clause, not to adhere to it.

### c. Taxes on Charter Parties

I'm not yet done with the 1797 Act. The Act included still another provision with questionable status under the Export Clause, a tax of one dollar on "any charter-party"<sup>127</sup> — generally a contract for the lease of a vessel, which could include a lease for carrying cargo from the United States to foreign ports. Instead of imposing a tax directly on exported goods, Congress slapped a

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could be distinguished. See *IBM*, 517 U.S. at 876-77.

124. *Id.* at 875.

125. *Id.* at 877.

126. *Id.* at 876 (citing Act of Mar. 3, 1791, ch. 15, § 51, (1 Stat. 199) 210-11 (tax on distilled spirits); Act of June 5, 1794, ch. 51, § 14, (1 Stat. 384) 387 (tax on snuff and refined sugar)). Section 51 of the 1791 Act, for example, provided that

if any of the said spirits [otherwise subject to the levy] shall, after the last day of June next, be exported from the United States to any foreign port or place, there shall be an allowance to the exporter or exporters thereof, by way of drawback, equal to the duties thereon, according to the rates in each case by this act imposed . . . .

Act of March 3, 1791, ch. 15, (1 Stat.) 210; see also Act of June 5, 1794, ch. 51 § 14, (1 Stat. 384) 387 (providing similar drawback). This was an example of scrupulousness. In fact, refunding duties paid on spirits not earmarked for exportation at the time of distillation was more generous than modern understanding requires. See Jensen, *Export Clause*, *supra* note 15, at 60-63.

127. Act of July 6, 1797, ch. 11, § 1, (1 Stat. 527) 527.

levy on ships carrying the goods, or, more precisely, on paper-work associated with the arrangements for such ships.

As was true with the other 1797 taxes, the constitutionality of a tax on charter-parties as it applied to exports wasn't tested until much later. In 1915, the Supreme Court struck down a similar measure in *United States v. Hvoslef*,<sup>128</sup> a companion case to *Thames & Mersey*.<sup>129</sup> The *Hvoslef* Court thought this was a slam-dunk issue. It's difficult to imagine anything more "integrally related" to exportation than contracts to charter ships that will carry exported articles: "The charters were for the exportation; they serve no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports."<sup>130</sup>

At bottom, the *Hvoslef* Court concluded that it was necessary to reject a tax on charter parties if the Export Clause was to be protected:

This prohibition . . . is designed to give immunity from taxation to property that is in the actual course of such exportation . . . . This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.<sup>131</sup>

Just so. And it was just as true in 1797, when congressional "giants" threw a constitutional limitation to the winds.

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128. 237 U.S. 1 (1915) (evaluating Act of June 13, 1898, ch. 448, § 6, (30 Stat. 448) 451, 460). Section 6 of the Act specified that a tax be imposed on the "things mentioned and described in Schedule A," and Schedule A included "charter party," defined as a [c]ontract or agreement for the charter of any ship, or vessel, or steamer, or any letter, memorandum, or other writing between the captain, master, or owner, or person acting as agent of any ship, or vessel, or steamer, and any other persons or persons, for or relating to the charter of such ship, or vessel, or steamer, or any renewal or transfer thereof . . . .

*Id.* at 460; see *Hvoslef*, 237 U.S. at 16.

129. As in *Thames & Mersey*, the 1915 Court wasn't made aware of the similar provision in the 1797 Act.

130. *Hvoslef*, 237 U.S. at 17.

131. *Id.* at 13.

## d. Post-Mortem on the 1797 Act

Nobody seems to care much about the Export Clause these days,<sup>132</sup> but people did in the late eighteenth century. And unless we assume that the founders were so formalistic as to be mindless, the 1797 Act was an obvious constitutional outrage. The Act demonstrates that the founding generation was perfectly capable of bending constitutional rules beyond the breaking point. If one wanted to continue to trash the Fifth Congress (I think it's lots of fun), one could find other constitutionally suspect provisions in the same piece of legislation.<sup>133</sup>

Perhaps I'm being too harsh on the Fifth Congress and on founders-in-power more generally. Maybe the giants simply misunderstood the limitations of the Export Clause (and maybe the *Hylton* Justices simply misunderstood the significance of the Direct-Tax Clauses). I don't think so, but genuine misunderstandings can happen. A misunderstanding is still a misunderstanding, however, no matter how genuine, and there's no reason to defer to the genuine misunderstandings of prior generations.

### 3. *How Hylton Does Matter: Taxes on Real Estate (and Other Items of Wealth)*

I've been arguing that the deference shown over the years to *Hylton* has been misguided, and, more generally, that we shouldn't take actions of founders-in-power as incontestably defining original understanding. One final point before moving to the Sixteenth Amendment: Professor Johnson has argued that we should step back to try to discern a "more general intent" of the founders.<sup>134</sup> Had they only known how unworkable the ap-

132. Except for the Supreme Court, which decided two cases under the Clause in the 1990s, both times striking down federal taxes as they applied to exportation. See *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996); *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998).

133. For example, the Act included a legacy tax, a stamp tax for any receipt or other discharge for or on account of any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of any statute of distributions, the amount whereof shall be above the value of fifty dollars, and shall not exceed the value of one hundred dollars, twenty-five cents; where the amount thereof shall exceed the value of one hundred dollars and shall not exceed five hundred dollars, fifty cents; and for every further sum of five hundred dollars, the additional sum of one dollar. Act of July 6, 1797, ch. 11, § 1, (1 Stat. 527) 527. Estate taxes and inheritance taxes are today assumed not to be direct taxes, but that's partly because the Supreme Court cited the 1797 Act as support for the constitutionality of such an unapportioned tax. See *Knowlton v. Moore*, 178 U.S. 41, 56 (1900) (finding support in the 1797 Act for congressional power to enact an unapportioned estate tax).

134. See Johnson, *supra* note 36, at 70.

portionment rule was, Professor Johnson says, they would have concluded that taxes on real estate should not be subject to apportionment. *Hylton*'s dicta didn't go far enough in gutting the Direct-Tax Clauses.

This point is important because Professor Johnson uses it to argue that wealth taxes, properly understood, shouldn't have been considered direct taxes by the founders. If that's right, an unapportioned tax on wealth would be permissible today, whether or not a wealth tax would qualify as a "tax on incomes" under the Sixteenth Amendment.<sup>135</sup>

But that isn't a position that can be reconciled with any reasonable conception of original understanding. It's true, as Professor Johnson argues, that the founders understood taxation of wealth to be within congressional power.<sup>136</sup> (*All* direct taxes were within Congress's power.) As far as I can tell, however, everyone who discussed direct taxes in the Constitutional Convention or in state ratifying conventions conceded that a tax on real estate would be a direct tax. The Justices in *Hylton* certainly thought that to be the case.<sup>137</sup> Congress could impose a wealth tax, but to do so, it would have to apportion the tax.

Professor Johnson tries to have it both ways with *Hylton*. He cites the case as the incontrovertibly correct product of "giants" when it stands for a position he likes (that apportionment should be required only when it makes no difference). He ignores the same "giants" when they say something he dislikes (that an unapportioned tax on wealth is a direct tax). Moreover, in the cases between *Hylton* and *Pollock*, which Professor Johnson characterizes as correctly holding that the Direct-Tax

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135. See Johnson, *supra* note 30, at 1728-29. Professor Ackerman also concludes that an unapportioned tax on real estate would be permissible, but not because of original understanding or any attempt to divine the meaning of "taxes on incomes." Instead, [s]ince the epic struggle between Franklin Roosevelt and the Old Court, the judiciary has consistently upheld democratic efforts to take control of the economy in pursuit of social justice. Under the constitutional regime inaugurated by the New Deal, there are no significant limits on the national government's taxing, spending, and regulatory power where the economy is concerned—other than the requirement that government compensate owners if their property is taken for public purposes.

Ackerman, *supra* note 3, at 3. I'll let others assault the proposition that "constitutional moments" amend the Constitution. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 109-16 (2002).

136. See Johnson, *supra* note 30, at 1728-29.

137. See *supra* notes 80-82 and accompanying text.

Clauses didn't limit the taxes at issue, the Supreme Court assumed that a real-estate tax was a direct tax.<sup>138</sup>

There's no reason to look for a more general intent in interpreting a provision when we have absolute proof that the founders thought that a tax on real-estate was direct. Even if you think it's intellectually anomalous to constrain taxes on real estate, that's not a justification for ignoring provisions intended to do just that. I reject treating *Hylton* as a definitive interpretation of the Direct-Tax Clauses, but the alignment between *Hylton* and evidence from other sources should leave no doubt about the characterization of a tax on real estate.

Further evidence that the founding giants considered a real-estate tax to be direct can be found in legislation. In 1798, Congress passed the first of several national taxes on real estate, and Congress apportioned the tax, using a complex mechanism to satisfy the apportionment rule.<sup>139</sup> If the behavior of early Congresses reflects the original understanding, as is often argued, then clearly a real-estate tax is direct.

My use of congressional behavior is not inconsistent with my criticism of the 1797 taxing statute. There's a difference between relying on an early determination that Congress was bound by constitutional limitations, as I'm doing here, and using a congressional enactment like the 1797 Act to "prove" that constitutional limitations don't apply. We can trust legislative bodies when they see limitations on their power (particularly when they're acting in a way consistent with other evidence of original understanding) much more readily than we can trust legislative bodies that purport to see no limitations.

A skeptic might respond that Congress wasn't necessarily indicating any particular understanding of constitutional requirements with the 1798 real-estate tax; maybe it was just acting cautiously by providing for apportionment. Congress doesn't have to exercise its full taxing power, of course, so what a cautious Congress does isn't controlling and may not even be helpful in determining the boundaries of congressional power.

That can't be what was going on in 1798, however. With the way the apportionment and uniformity rules are set up, there was no "cautious" position for Congress to take. The two rules are mutually exclusive: one rule or the other must apply to any

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138. See *supra* note 21.

139. See Act of July 14, 1798, ch. 75, (1 Stat.) 597.

particular tax, and a tax can't satisfy both rules simultaneously (except in the unlikely event that the tax base is distributed proportionately to state populations). To do its constitutionally mandated job, Congress must determine whether a tax is direct because it must decide whether the tax must be apportioned or whether it must be uniform. Congress in 1798 *had* to determine whether a tax on real-estate was direct, and it made that determination consistent with the pervasive understanding of the time.

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Not all of the founders were power-grabbers, of course, and not all of the actions of early governmental bodies were constitutionally suspect. In this discussion of *Hylton* and the 1797 Act, my point is only that there's no reason to think that founders-in-power were right in constitutional interpretation merely because they were "giants." In trying to discern the original understanding of the Direct Tax Clauses, we need to look at original sources more broadly—including the language of the Constitution itself—and to look for a meaning that gives the Clauses effect. Professor Johnson hasn't done that; I think I have. An interpretation that treats direct taxes as levies without indirect taxes' built-in protections against governmental abuse gives substance to the Clauses within the constitutional structure.

#### IV. THE SIXTEENTH AMENDMENT

To this point, I've been defending the significance of the Direct-Tax Clauses. If those Clauses have no effect, then we have no need to parse the language of the Sixteenth Amendment. An exemption from the direct-tax apportionment rule is irrelevant if the apportionment rule is meaningless today.

For the remainder of this article, I'll assume that my argument has been right so far and that the Direct-Tax Clauses were intended to be significant limitations on the taxing power, far more significant than the *Hylton* Court suggested. I'll also assume that *Pollock* was rightly decided. There's a lot in the *Pollock* opinions that is embarrassing, but the result was right. The 1894 income tax wasn't an indirect tax—it wasn't shiftable and therefore avoidable—and, without the characteristics of indirect taxes, an income tax was potentially dangerous. Notwithstanding *Hylton's* dicta, the income tax should therefore have been sub-

ject to the apportionment rule.<sup>140</sup> In fact, if one of the reasons for the rule was to discourage sectionally directed taxes, the income tax in 1894 was Exhibit A: given the concentration of wealth in the industrialized Northeast, the 1894 tax was clearly directed at one section of the country. Indeed, Populists reveled in the sectional effects of the income tax.<sup>141</sup>

#### A. INTERPRETING "TAXES ON INCOMES"

With those assumptions, the interpretive question for the Sixteenth Amendment should be straightforward: What sorts of taxes did the Amendment remove from the otherwise applicable rule requiring apportionment of direct taxes?

For Professors Johnson and Ackerman, however, that question doesn't matter. In their view, the Amendment wasn't necessary from a technical standpoint. *Pollock* was so clearly wrong that Congress should have been able to enact another unapportioned income tax without tinkering with the Constitution.<sup>142</sup> At the turn of the twentieth century, a number of congressmen thought that as well. They argued in favor of enacting a new income tax, expecting that the Supreme Court would reverse direction in the inevitable challenge and overturn *Pollock*.<sup>143</sup>

It nevertheless eventually became clear to income-tax supporters that there could be no unapportioned income tax without a constitutional amendment. For congressmen who thought *Pollock* was defensible—and their numbers were almost certainly larger than Professors Johnson and Ackerman think—there was no alternative to amending the Constitution. But even congressmen who thought an amendment unnecessary were nervous about offending the Supreme Court by enacting a new tax without constitutional protection.<sup>144</sup> (Besides, there was no

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140. See *supra* notes 16-17 and accompanying text; Jensen, *Apportionment*, *supra* note 16, at 1077-79.

141. See Jensen, *Apportionment*, *supra* note 16, at 1095-107.

142. See Johnson, *supra* note 30, at 1731-33; Ackerman, *supra* note 3, at 31.

143. See Jensen, *Taxing Power*, *supra* note 16, at 1109-14.

144. See 44 CONG. REC. 3936 (1909) (statement of Cal. Sen. Frank P. Flint reporting on the decision of the Senate Finance Committee to recommend a constitutional amendment: "We felt that, in view of the decision . . . in the *Pollock* case, it would be indelicate, at least, for the Congress of the United States to pass another measure and ask the Supreme Court to pass upon it, when they had already passed upon the proposition . . ."). There's also evidence that some who "supported" a constitutional amendment, rather than a new statute, thought an amendment wouldn't be ratified. They hoped to destroy the idea of an income tax while apparently endorsing it. See Jensen, *Taxing Power*, *supra* note 16, at 1112-14.

guarantee that the Court would overrule *Pollock*.<sup>145</sup>) As Professors Johnson and Ackerman see things, *Pollock*-skeptics outnumbered those who thought the case was rightly decided, and the Amendment merely made it politically possible to enact a new income tax.

Professors Johnson and Ackerman go even further. They argue that the Amendment was drafted to show congressional disdain for the Supreme Court's determination in *Pollock* and to return the constitutional understanding to the pre-*Pollock* era, when at most capitation and real-estate taxes were governed by apportionment. They stress that Congress, in assembling the resolution that became the Sixteenth Amendment, carefully chose language to show that it didn't accept *Pollock* and that an expansive conception of "direct taxes" was wrong.

That's an interesting idea, but it isn't necessarily relevant to constitutional analysis—why should we care what Congress in 1909 thought about the constitutional merits of *Pollock*?<sup>146</sup> It also bears no apparent relationship to reality. There's no evidence whatsoever that the language of the Sixteenth Amendment was crafted to repudiate *Pollock* except in the most obvious way, by making it possible to have a tax on incomes without apportionment.<sup>147</sup>

It's always a good idea to start the interpretive process with constitutional language. Nothing in the text of the Sixteenth Amendment suggests the far-reaching consequences that Professors Johnson and Ackerman see. *Pollock* had invalidated an *income* tax because it hadn't been apportioned, and the Amendment on its face makes it possible to have a "tax on incomes" without apportionment. As Professor Fiss has noted, the Amendment "simply removed what appeared to be a technical objection or impediment that *Pollock* had posed to the income tax."<sup>148</sup> It exempted one category of taxes from apportionment, nothing more.

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145. See Jensen, *Taxing Power*, *supra* note 16, at 1109-14.

146. We're as well-equipped to evaluate the merits as a bunch of congressmen were. Besides, the congressmen who thought *Pollock* was wrong (and there were many, I concede) weren't going back to first principles. They were restating what had become conventional wisdom before *Pollock*, and, not coincidentally, arguing that congressional power should be unconstrained. "We can do what we want" is a position you'd expect most congressmen to take on almost any issue.

147. See generally Jensen, *Taxing Power*, *supra* note 16, at 1091-129.

148. FISS, *supra* note 44, at 100.



And that was quite enough. It's not as though dealing with *Pollock* in this technical way was trivial. In fact, the practical consequences of the Sixteenth Amendment were so far-reaching—the personal income tax is an incredible revenue-raiser—that it's hard to see why anyone would feel the need to look for still broader effects. Think of the politics of the early twentieth century: If you wanted to make an unapportioned income tax possible (and a majority of congressmen wanted to do just that), and if you thought that a constitutional amendment was going to be politically necessary to get that result, what would you try to do? Draft an amendment as broadly as possible so as to increase the likelihood of resistance? Or draft a narrow amendment that unquestionably made an unapportioned income tax possible? The answer should be obvious.

Professors Johnson and Ackerman also can't identify any legislative history to support their counterintuitive interpretation. The final language of the Amendment wasn't hammered out on the floors of the Houses of Congress, with recorded debates to guide us as to what was happening. The language was drafted in closed sessions of the Senate Finance Committee, a committee controlled by *Pollock*-friendly Republicans and chaired by Senator Nelson Aldrich of Rhode Island, no fan of the income tax.<sup>149</sup> We don't know exactly what happened, but it's incredible to think that these folks were trying to devise language to undercut *Pollock*'s broad rationale.

Both Professors Johnson and Ackerman attach great significance to the fact that the Finance Committee removed a reference to "direct taxes" from a draft resolution. There's no evidence, however, that the deletion was intended to signal a repudiation of *Pollock*. If anything, the change points in the opposite direction.

Senator Norris Brown's original language for what became the Sixteenth Amendment provided that "Congress shall have power to lay and collect direct taxes on incomes" without apportionment among the several States according to population.<sup>150</sup> As the resolution came out of the Finance Committee, the Amendment made no specific reference to direct taxation: "The Congress shall have power to lay and collect taxes on incomes,

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149. See Jensen, *Taxing Power*, *supra* note 16, at 1119. Aldrich was one of those nominal "supporters" of a constitutional amendment who probably hoped to use the process to kill the income tax. See *supra* note 144.

150. S.J. Res. 25, 61st Cong., 44 CONG. REC. 1568 (1909).

from whatever source derived, without apportionment among the several States and without regard to any census or enumeration."<sup>151</sup> According to Professor Johnson, "[t]he change, rejecting Brown's language, is relevant evidence that Congress, in proposing the amendment, did not mean to treat the income tax as direct, and did not mean to make taxes that fell just outside the definition of income, as taxes that failed for want of apportionment."<sup>152</sup>

Professor Ackerman extends the argument, accusing Senator Brown of a "clever verbalism." Brown, he says, aimed "to transform this tactical retreat [having to amend the Constitution to make an income tax possible] into a long-run conservative victory" by conceding the direct character of income taxes, thereby "explicitly endorsing the *Pollock* majority's vast expansion of the concept" of direct taxes.<sup>153</sup> When new language emerged from the Finance Committee, it was

a major retreat from Brown's conservative ambitions. Gone was [Brown's] express vindication of *Pollock*'s decision to expand the category of "direct" taxation; in its place we find an explicit repudiation of *Pollock*'s effort to expand the category by insisting that an income tax, from whatever source derived, should be immune from the rule of apportionment.<sup>154</sup>

The Committee drafters, Professor Ackerman says, "took special efforts to avoid freezing *Pollock*'s doctrine concerning the scope of the 'direct tax' clauses."<sup>155</sup> The language "had been revised to eliminate all explicit endorsement of *Pollock*'s reasoning."<sup>156</sup>

I have no idea where any of that comes from. There are no historical documents that support any of these suppositions, nothing to show "explicit repudiations" and "special efforts" in committee. If anything, the change in the language of the Brown resolution points in the opposite direction. The resolution hinted that there might be some income taxes that aren't direct (there are "direct taxes on incomes" but also therefore *indirect* taxes on incomes). If a congressman wanted to make it clear that *Pollock* was *rightly* decided, that an income tax is *ipso facto* a direct tax,

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151. S.J. Res. 40, 61st Cong., 44 CONG. REC. 3900 (1909).

152. Johnson, *supra* note 30, at 1733.

153. Ackerman, *supra* note 3, at 37.

154. *Id.* at 38.

155. *Id.* at 51 (emphasis deleted).

156. *Id.* at 38.

he would have wanted to change Brown's language. In short, it's far more plausible to read the Amendment as a vindication rather than a repudiation of *Pollock*.<sup>157</sup>

In any event, the term used in the Amendment proper is "taxes on incomes," which doesn't come close to supporting the idea that the pre-*Pollock* understanding was to be resuscitated or, more broadly, that all direct taxes (except maybe capitation taxes) were to be exempted from apportionment. In fact, the Senate explicitly considered and rejected proposals to do just that. Before the Brown resolution had been sent to committee, Senator Anselm McLaurin of Mississippi argued that because the impediment Congress faced was the Direct-Tax Clauses, Congress should strike out the references to direct taxes and leave apportionment to apply only to capitation taxes. Doing so would "accomplish all that [Brown's] amendment proposes to accomplish and not make a constitutional amendment for the enacting of a single act of legislation" [the income tax].<sup>158</sup> Senator Brown refused the apparently friendly amendment, however: "That may be true, Mr. President; *but my purpose is to confine it to income taxes alone*, and to forever settle the dispute by referring the subject to the several States."<sup>159</sup>

After the resolution had been reported by the Finance Committee, with much of the language changed but with the reference to "taxes on incomes" intact, Senator McLaurin again suggested it would be better to amend the Constitution to delete references to "direct taxes."<sup>160</sup> McLaurin said that his proposal would "eliminate from the Constitution every cause of contention over the question of the authority of Congress to levy an income tax, except as to the power of Congress to grade an income tax."<sup>161</sup> And he was worried that by passing a resolution applicable only to income taxes, Congress might be seen as "recogniz[ing] the income tax as a direct tax."<sup>162</sup> Once again, however, McLaurin's proposal went nowhere. The Amendment was limited in its language, and it was intended to be that way.

With the language of the Amendment as ratified, and with no evidence that the Amendment was intended to eliminate the

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157. See Jensen, *Taxing Power*, *supra* note 16, at 1120.

158. 44 CONG. REC. 3377 (1909).

159. *Id.* (emphasis added); see Jensen, *Taxing Power*, *supra* note 16, at 1120-21 (discussing why Brown might have wanted to limit the scope of the Amendment).

160. See 44 CONG. REC. 4067 (1909); 44 CONG. REC. 4109 (1909).

161. 44 CONG. REC. 4109 (1909).

162. *Id.*

apportionment rule for anything except "taxes on incomes," we have to interpret that term as given. We can't duck the responsibility of determining whether a tax is direct to begin with and, if so, whether it's an income tax. Within the universe of "direct taxes," only "taxes on incomes" are exempt from apportionment.

I can't promise a precise definition of "taxes on incomes," but I can suggest a couple of categories that don't qualify—direct-consumption taxes and wealth taxes. I've argued elsewhere that the determination of what constitutes a "tax on incomes" should be informed by the debates that led to the adoption of the 1894 income tax, and, after the Supreme Court struck down that tax as unconstitutional, by the process that culminated in the Sixteenth Amendment. Those debates make it clear that the proponents of an income tax and the proponents of the Amendment saw income taxes and consumption taxes as fundamentally different levies.<sup>163</sup>

Before the modern income tax, the national government relied almost entirely for revenue on *indirect* consumption taxes (tariffs and excises), which had increasingly come to be seen as unfair. The point of the push for income taxation was to rechannel the national government's historical reliance on consumption taxes, not to validate new, *direct* forms of consumption taxes. If an unapportioned consumption tax is direct—and some modern proposals for direct-consumption taxes would be "direct" for constitutional purposes—it would have to be a "tax on incomes" to be constitutional. Given the history of the Sixteenth Amendment, I'm skeptical that a consumption tax would qualify.

Nor does the history of the Amendment support the proposition that a wealth tax ought to be characterized as a "tax on incomes." (There's no doubt that a tax on wealth was originally understood to be a direct tax.<sup>164</sup> If an unapportioned tax on wealth would be constitutional today, it has to be because of the Sixteenth Amendment.<sup>165</sup>) There were certainly congressmen at the time who characterized the income tax as an attack on concentrations of wealth. But the congressmen were talking about

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163. See generally Jensen, *Taxing Power*, *supra* note 16, at 1100-02 & 1124-26.

164. See *supra* Part III.D.3.

165. As an alternative to his primary argument that a wealth tax isn't direct, Professor Johnson also argues that a wealth tax ought to be characterized as a "tax on income." See Johnson, *supra* note 30, at 1733.

imposing taxes on the wealthy through an *income* tax, not about levying taxes measured by the value of the wealth itself.<sup>166</sup>

It would have made no sense for income-tax proponents to draft the Amendment in a broader way than necessary. If a property tax might have been understood to be a “tax on incomes,” that could only have complicated prospects of ratification. Getting authority for an unapportioned *income* tax was an extraordinary expansion of the national revenue power as it was. The need for still other forms of taxation wasn’t apparent then, and it’s not apparent now.

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Not every direct tax is a “tax on incomes” automatically exempt from apportionment because of the Sixteenth Amendment. A conscious decision was made to limit the Sixteenth Amendment’s scope to “taxes on incomes.” All that the Amendment did—all that it was intended to do—was to enable an unapportioned *income* tax.

#### B. THE CONTEMPORANEOUS UNDERSTANDING OF THE AMENDMENT

The understanding that the Sixteenth Amendment exempts only a discrete category of taxes—“taxes on incomes”—from apportionment isn’t something I’m making up. It reflects the language and history of the Amendment, and it was also the understanding of courts and Congress after ratification.

##### 1. *The Courts*

For the first two decades after ratification, the Supreme Court interpreted the Sixteenth Amendment as requiring careful consideration of whether a tax that would otherwise be subject to apportionment might be a “tax on incomes.”

When the original understanding of the Direct-Tax Clauses is at issue, Professor Johnson and other proponents of a nearly unlimited taxing power tell us that what the Supreme Court said in *Hylton*, decided seven years after the ratification of the Constitution, was definitive. The Federalist Justices said almost exactly what Professor Johnson wants to hear, and we’re therefore told that the Court understood the recently drafted constitutional language better than we can.

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166. See Jensen, *Taxing Power*, *supra* note 16, at 1128-29.

In contrast, no one seems to care about what the Supreme Court said in interpreting the Sixteenth Amendment. There were Court decisions interpreting the Amendment within seven years of ratification, but Professor Johnson and friends don't think we should pay attention to those cases. Why don't we treat those Justices as among the "giants" of the Amendment?

I guess we don't do that because those old decisions assumed that the term "taxes on incomes" had content, that the Amendment wasn't a complete repudiation of the Direct-Tax Clauses, and that not every unapportioned tax that Congress might have characterized as a tax on incomes was automatically valid. The Court viewed the Amendment quite differently from Professor Johnson, who argues that "income" . . . is a malleable concept<sup>167</sup> that can mean what Congress and the courts want it to mean.<sup>167</sup>

The big case is *Eisner v. Macomber*,<sup>168</sup> in which the Court in 1920 considered whether Congress's inclusion of totally proportionate stock dividends within the base of an unapportioned income tax was constitutional. Macomber, who had received a stock dividend that didn't change her interest in the distributing corporation, argued that the dividend wasn't "income" and therefore wasn't exempted from apportionment by the Sixteenth Amendment. With *Pollock* still on the books, the tax on the dividend was direct. If the tax wasn't on "incomes," it had to be apportioned.

Of the nine Justices sitting in *Macomber*, seven took Mrs. Macomber's argument seriously. The five-man majority, in an opinion by Justice Pitney, concluded that a totally proportionate stock dividend wasn't "income": it did nothing more than cut up the already existing corporate pie into more pieces, keeping every shareholder's fraction unchanged.<sup>169</sup> The Court and Macomber understood, as Yogi Berra didn't, that it makes no difference whether you cut your pizza into four or eight slices if you consume the whole thing yourself.

In a lengthy dissent, Justice Brandeis (joined by Justice Clarke) offered reasons why stock dividends could be treated as income and could therefore properly be included in an income-tax base. Like the majority, however, Justice Brandeis accepted the proposition that the term "incomes" had content. Although

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167. Johnson, *supra* note 30, at 1733.

168. 252 U.S. 189 (1920).

169. *Id.* at 210-11.

congressional power was to be "liberally construed,"<sup>170</sup> the Amendment wasn't intended to permit Congress to avoid apportionment simply by characterizing an item as income. Indeed, Justice Brandeis noted in a later case that "Congress cannot make a thing income which is not so in fact."<sup>171</sup>

*Macomber* wasn't aberrational. In two other cases decided during the 1920s, *Weiss v. Stearn*<sup>172</sup> and *Edwards v. Cuba Railroad Co.*,<sup>173</sup> the Court rejected taxes on the ground that the taxes were direct and didn't fit the Amendment's definition of "taxes on income."<sup>174</sup> Many other cases took it for granted that the term "taxes on incomes" had enforceable content.<sup>175</sup>

For many modern commentators, however, only one opinion in *Macomber* really matters, that of Justice Holmes (joined by Justice Day), who thought the whole issue was silly. In a line quoted by both Professors Johnson and Ackerman, Holmes wrote that "[t]he known purpose of the Amendment was to get rid of nice questions as to what might be direct taxes."<sup>176</sup> According to Professor Johnson, Justice Holmes "showed his wisdom" by that comment.<sup>177</sup>

Justice Holmes didn't explicitly say that the Direct-Tax Clauses were no longer relevant. His opinion is cursory—"giants" don't have to explain—but it's conceivable that he meant only that the Clauses should return to their meaning before *Pollock*, with the relatively easily identified categories of capitation and real-estate taxes still subject to apportionment.<sup>178</sup>

170. *Id.* at 226 (Brandeis, J., dissenting).

171. *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 114 (1925) (Brandeis, J.).

172. 265 U.S. 242 (1924).

173. 268 U.S. 628 (1925).

174. See generally Jensen, *Taxing Power*, *supra* note 16, at 1138-40.

175. See, e.g., *Merchants' Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 519 (1921) ("[T]his Court has . . . approved . . . what it believed to be the commonly understood meaning of the term ['income'] which must have been in the minds of people when they adopted the Sixteenth Amendment . . ."); *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926) ("It was not the purpose or effect of that amendment to bring any new subject within the taxing power"); *Taft v. Bowers*, 278 U.S. 470, 481 (1929) ("[T]he settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income"); *Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 379 (1934) ("The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment").

176. *Macomber*, 252 U.S. at 219-20.

177. Johnson, *supra* note 30, at 1734.

178. Even then categorization won't be automatic: there may be "nice questions" as to whether a tax is on real estate or not. For example, in *Helvering v. Independent Life Insurance Co.*, 292 U.S. at 378, the Court, in dictum, suggested that a tax on what might be characterized as imputed income associated with real estate would be subject to ap-

That interpretation would have been questionable enough, but let's suppose Justice Holmes meant, as many commentators assume, that the Sixteenth Amendment rendered the Direct-Tax Clauses dead letters. If that was his point, where in the world did it come from? Seven other Justices said nothing of the sort. Even two of the dissenters (Justices Brandeis and Clarke) assumed that the term "incomes" meant something. Indeed, Justice Holmes felt constrained, albeit minimally, by the language of the Amendment. He purported to be interpreting the word "incomes" and to be looking for "a sense most obvious to the common understanding at the time of [the Amendment's] adoption."<sup>179</sup> If Holmes was wrong about what people were thinking during ratification, however, his conclusion was wrong. The language of the Amendment doesn't suggest anything like Holmes's interpretation, and, probably most telling, Holmes cited *nothing*—no evidence, no authority—to support his contention.

Justice Holmes provided no evidence or authority because there was none. In fact, as I've noted, the Senate had explicitly considered, and rejected, proposals to delete the references to "direct taxes."<sup>180</sup> Such a step would really have eliminated "nice questions" about meaning, but that didn't happen. And I can't imagine the ratifiers of the Sixteenth Amendment thought that Congress can define *anything* as income. If there had been any hint that the Amendment would permit an unapportioned tax on all forms of unrealized appreciation, say—a tax on property—the ratification of the Amendment would have been much more difficult, and maybe impossible.

Ultimately we're supposed to pay attention to Justice Holmes, I guess, because he was Holmes, a "giant," and that's pretty much what Professor Ackerman says. He notes that "we can never recapture the directness of [Holmes's] lived experience of the [Amendment's] ratification campaign."<sup>181</sup> As a result, "we are left with Holmes's ipse dixits concerning original understanding—certainly an important resource, but one that may be too easily dismissed by readers who have not themselves lived through the process of amendment ratification."<sup>182</sup>

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portionment.

179. *Macomber*, 252 U.S. at 220 (Holmes, J., dissenting) (quoting *Bishop v. State*, 149 Ind. 223, 230 (1898)).

180. See *supra* notes 152-156 and accompanying text; Jensen, *Taxing Power*, *supra* note 16, at 1120-21.

181. Ackerman, *supra* note 3, at 45.

182. *Id.* at 45-46. Since ratification of the Twenty-Seventh Amendment took over two hundred years, from 1789 until 1992, the universe of people "who have not . . . lived



When the language of the Amendment doesn't support your position, and you can't find any other favorable evidence, posit "wisdom" and "lived experience"! I'm sorry, but I find it impossible to take these positions seriously.

After all, the other members of the *Macomber* Court lived through precisely the same ratification process—which ended only seven years before the case was decided—yet all but Justice Day, who joined in Justice Holmes's opinion, saw things in a very different way. What's the reason for thinking that Holmes's experience for these purposes was more worthy of note than the experiences of the other Justices?

Professor Ackerman likes the Holmesian view because he sees the Amendment as part of an uprising to repudiate *Pollock* and reestablish plenary taxing power: "When the People [*sic*] mobilize to overrule the Court, it seems particularly inappropriate for the Justices to respond in a niggling fashion."<sup>183</sup> But viewing the Amendment as part of a move to validate an unlimited national taxing power is silly. The Amendment was intended to make possible a tax that, at the time, reached a trivial fraction of the population. If the "People" were mobilizing, it was to enable a tax that would hit someone else.<sup>184</sup>

Notwithstanding Justice Holmes, the Supreme Court thought the language of the Sixteenth Amendment was worthy of being interpreted, a result that shouldn't be surprising. (Some might even find this result reassuring: language matters!) Not every tax (or part of a tax) is automatically a "tax on incomes." To determine whether a direct tax is exempt from apportionment, we need to determine whether it's a "tax on incomes."

## 2. Congress

Modern proponents of a nearly unlimited taxing power also ignore the actions of Congress immediately after ratification of the Sixteenth Amendment. Congress initially interpreted its expanded power to enact an unapportioned tax on incomes in a conservative way. Congress's conduct didn't necessarily reflect the outer boundaries of its power, of course, but we can say this

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through the process of amendment ratification" is pretty small. (I'm still tingling from the experience.)

183. *Id.* at 55.

184. See Jensen, *Apportionment*, *supra* note 16, at 2343 n.41 (noting that 1894 income tax directly affected only about one percent of the population).

much for sure: after ratification, Congress didn't think that it had unconstrained power to define something as "income."

For example, Congress didn't—and, for that matter, still doesn't—define a corporate dividend paid out of pre-1913 earnings as being taxable, even though the Supreme Court has suggested there would be no constitutional problem as long as the dividend is distributed after the Amendment became effective.<sup>185</sup> Nor did Congress ever try to tax pre-1913 appreciation in the value of property, even if the appreciation is realized after 1913.<sup>186</sup>

Congress acted conservatively because the term "taxes on incomes"—which came out of Congress, after all—wasn't understood to be all-encompassing. With the Supreme Court looking over its shoulder, Congress was being extra careful not to exceed its constitutional powers. We can argue about what the boundaries of congressional taxing power are, but Congress recognized that the Sixteenth Amendment hadn't eliminated boundaries altogether.

## V. CONCLUSION

This article was intended as an exercise in taking constitutional provisions seriously, something all readers of *Constitutional Commentary* should see as a worthwhile goal. The Direct-Tax Clauses haven't been hot topics of constitutional discussion for nearly a century, but they were intended to be important. And they could still have effect today if the concept of "direct taxes" retains significance and the term "taxes on incomes" is limited in its effects. Although the Sixteenth Amendment diminished the importance of the Clauses by making it possible to have a "tax on incomes" without apportionment, the Amendment didn't repeal the Clauses.

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185. For 1913, the tax applied only to "net income accruing from March first to December thirty-first." Income Tax Law of 1913, ch. 16, § II.D (38 Stat. 166) 168. Congress didn't try to tax distributions from pre-1913 earnings. See Revenue Act of 1916, ch. 463, § 2(a) (39 Stat. 756) 757 (defining "dividends" as distributions "out of earnings or profits accrued since March first, nineteen hundred and thirteen"); I.R.C. § 316(a)(1) (1994) (defining "dividends" as distributions out of "earnings and profits accumulated after February 28, 1913").

186. See Revenue Act of 1918, ch. 18, § 202(a)(1) (40 Stat. 1057) 1060 (providing that for "property acquired before March 1, 1913, the fair market value of such property as of that date" would be its basis); see also I.R.C. § 301(c)(3)(B) (1994) (exempting non-dividend distributions exceeding basis to the extent the distribution is "out of increase in value accrued before March 1, 1913"); I.R.C. § 1015(c) (1994) (treating as the basis of property acquired by gift before 1921 the value at the time of acquisition).

Not all taxes are automatically constitutional. Words matter, and we shouldn't assume that terms like "direct taxes" and "taxes on incomes" are infinitely malleable. No tax since 1861 has been apportioned, and I assume Congress isn't likely to consider enacting an apportioned tax ever again. But if a proposed tax is going to avoid the apportionment requirement, it's essential that the tax either be indirect or be a "tax on incomes."